IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-814

DONALD WALLACE, *et al.*,

Petitioners,

v.

MICHAEL KERN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners Donald Wallace, et al., acting on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 30, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 400 and appears in the Appendix, infra, p. 1a. The

opinion of the United States District Court is unreported and appears in the Appendix, infra, p. 21a. The order of the United States District Court is unreported and appears in the Appendix, infra, p. 88a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 30, 1975. A timely petition for rehearing was denied on September 9, 1975, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is a federal court, in a class action by pre-trial detainees, barred by principles of comity from deciding a claim that state court bail practices deny the plaintiffs the due process of law?

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV--Citizenship; privileges and immunities; due process. . .

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was filed in July 1972 by seven indigent pre-trial detainees incarcerated in the Brooklyn House of Detention for Men, on behalf of themselves and all other persons detained pending trial on felony indictments in the Supreme Court of the State of New York in Kings County (Brooklyn). The amended complaint sought declaratory and injunctive relief for systematic and widespread deprivation of constitutional rights including, inter alia, denial of the effective assistance of counsel, restrictions on access to the courts, failure to provide speedy trials, coercion in obtaining guilty pleas, and denial of reasonable bail.

Prior to the judgment now at issue, several aspects of the case were litigated on motions for preliminary injunc-

tions. In May 1973, the District Court (Judd, D.J.) found that the excessive caseloads of Legal Aid Society lawyers violated petitioners' Sixth Amendment rights, and granted petitioners' motion for preliminary relief in the form of a caseload ceiling. The District Court also enjoined the court clerk's practice of refusing to calendar pro se motions submitted by petitioners who had counsel of record. Wallace v. Kern, 392 F.Supp. 834 (E.D.N.Y. 1973). The Court of Appeals reversed, holding that the Legal Aid Society does not act under color of state law, and that comity considerations barred relief as to state court calendar practices. Wallace v. Kern, 481 F.2d 621 (1973), cert. denied, 414 U.S. 1135 (1974).

Subsequently, the District Court found that the lengthy pretrial delays suffered by many of petitioner's class violated their right to a speedy trial, and it preliminarily ordered that persons incarcerated pending trial for more than six months (nine months in homicide cases) be tried or released on their own recognizance within forty-five days of their written request. Wallace v. Kern, 371 F. Supp. 1384 (E.D.N.Y. 1974). The Court of Appeals reversed, holding that relief from unconstitutional trial delays could not be granted prospectively to a class, though it noted that "[l]engthy pretrial confinement continues to be

the rule in Kings County." Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974), cert. denied, 420 U.S. 947 (1975).

The present petition arises from the plenary trial on the remaining causes of action. The District Court denied relief as to coercion of guilty pleas, holding that the question of voluntariness must be determined individually and not in a class action; it granted relief as to the facilities for attorney-client consultation in the court buildings; it found that the bail-setting practices of the state courts of Kings County did not meet the requirements of the Due Process Clause; and it dismissed the remainder of the complaint. Only the ruling regarding bail practices was appealed.

The District Court found the bail practices of the Kings County courts constitutionally unsound. It based this finding on evidence that bail was initially set in a perfunctory manner using incomplete and sometimes misleading information, that accused persons were denied a sufficient opportunity to present evidence regarding the need for financial conditions to assure their presence at trial, and that bail review in those courts was ineffective due to the absence of statements of reasons for prior bail determinations and to the long delays before any non-perfunctory review of bail conditions became available (Ap-

pendix at 28a-33a). The District Court further found that an erroneous bail determination may lead to protracted detention under squalid and oppressive conditions and to the disruption of a person's family, social and economic relationships; and more importantly, that the bail decision may determine the outcome of the criminal case itself. Persons who cannot make bail cannot help their attorneys gather evidence and locate witnesses; they are disadvantaged, both in plea bargaining and at sentencing after trial, because they cannot show their ability to hold a job and/or stay out of trouble while the case is pending; and incarcerated persons suffer psychological stress leading to severe anxiety and apathy and amounting to substantial coercion to plead guilty rather than stand trial. Consequently, the District Court found that persons detained pending trial were more likely to be convicted than those bailed or otherwise released; less likely to receive probation if convicted; and likely to receive a longer sentence if sent to prison (Appendix at 42a-43a).

The District Court rejected the petitioners' claim that money bail is per se a violation of equal protection, holding that there is a compelling state interest in assuring the reappearance of accused persons and that money bail is not discriminatory in all cases (Appendix at 60a-63a). But the

court upheld the petitioners' procedural claims, stating (Appendix at 84a):

> "The due process clause, however, requires that a decision which may result in prolonged confinement shall be based on full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence and with a written statement of the reasons why a particular bail determination is reached.
>
> * * *
>
> "The necessity of improvements in the bail system is enhanced by the considerable length of time which frequently elapses in pre-trial confinement in Kings County."

Because of the above-mentioned defects in the Kings County bail practices, the District Court found that those practices fall short of the requirements of due process, and that the petitioners were therefore entitled to a prompt evidentiary hearing on the question of bail, and to a statement of reasons for each bail determination.

These conclusions were embodied in an order providing that incarcerated persons charged with felonies in Kings County be entitled, if they so request, to an evidentiary hearing on the necessity of financial conditions of pretrial release. A hearing could be requested beginning 72 hours after arraignment, or later if justified by new evidence or changes in facts. The prosecution would have the burden of proving that financial conditions were necessary to ensure the reappearance of the accused. The accused would

also be entitled to a written statement of the reasons, including the facts relied on, for the setting of money bail or for the absolute denial of pretrial release.

In granting this relief, the District Court held the rule of Younger v. Harris, 401 U.S. 37 (1971), inapplicable because "[i]mproper pre-trial confinement would not be an issue on a defendant's trial on the criminal charge" and because the petitioners "are not seeking even interference with any pending bail application, but an announcement of [their] constitutional rights. . . ." (Appendix at 82a-83a). However, the Court of Appeals reversed the judgment insofar as appealed from on the authority of Younger, holding that the District Court's decision constituted a "fissiparous and gratuitous" intrusion on the state's criminal process. (Appendix at 19a). A motion for rehearing was timely filed and was denied on September 9, 1975.

REASONS FOR GRANTING THE WRIT

I

THIS CASE RAISES IMPORTANT QUESTIONS IN THE TROUBLED AREA OF STATE-FEDERAL JUDICIAL RELATIONS, AND REQUIRES THE INTERPRETATION OF THE RECENT PRECEDENTS OF GERSTEIN v. PUGH AND O'SHEA v. LITTLETON, ON WHICH THE COURT BELOW ERRONEOUSLY RELIED.

Relations between state and federal judiciaries in our federal system have greatly concerned this Court in recent years. See Doran v. Salem Inn, Inc., ___ U.S. ___, 43 U.S.Law Week 5039 (June 30, 1975); Hicks v. Miranda, ___ U.S. ___, 43 U.S.Law Week 4857 (June 24, 1975); Ellis v. Dyson, 421 U.S. 426 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975); Allee v. Medrano, 416 U.S. 802 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Preiser v. Rodriguez, 411 U.S. 475 (1973); Younger v. Harris, supra. This case, unlike Younger v. Harris and most of its progeny, is a class action seeking prospective procedural relief, and requires this Court to clarify its decision in Gerstein v. Pugh, supra, and the effect of certain dicta in O'Shea v. Littleton, 414 U.S. 486 (1974).

In Gerstein v. Pugh, supra, the plaintiffs sought an injunction mandating that "probable cause" hearings be

held for state criminal defendants charged by information. The defendant judges and prosecutors argued that such relief was barred by principles of federal-state comity; this Court stated (420 U.S. at 108, n. 9):

> "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, Younger v. Harris, 401 U.S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See Conover v. Montemuro, 477 F.2d 1073, 1082 (CA3 1972); cf. Perez v. Ledesma, 401 U.S. 82 (1971); Stefanelli v. Minard, 342 U.S. 117 (1951)." (emphasis supplied).

The District Court's order in the present case is virtually identical in purpose and effect to that in Gerstein. It "was not directed at the state prosecutions as such, but only at the legality of pretrial detention" without an adequate judicial hearing. That issue likewise "could not be raised in defense of the criminal prosecution," and an order to grant constitutional bail hearings "could not prejudice the trial on the merits."

The Court of Appeals conceded the facial applicability of this language, but went on to interpret it "in the light of the factual and legal setting the Court encountered." Appendix at 15a. The court below then cited the unavail-

ability of habeas corpus to test probable cause, and the 30-day or longer delay before other state remedies became available, Gerstein, supra, 420 U.S. at 106, as distinguishing Gerstein from the present case. However, the Gerstein Court did not mention these facts in its discussion of comity quoted above; there is nothing in the Gerstein opinion to suggest that they were important to the question of comity; and the distinction drawn is wholly unsupported by the policies underlying the comity doctrine.

What this Court must do, and what the court below failed to do, is to distinguish injunctive protection of procedural rights, on the one hand, from abortion of state criminal cases and interlocutory adjudications of the merits of collateral issues, on the other. This distinction is explicit in Gerstein and implicit in this Court's basic comity decisions. The intervention condemned in Younger v. Harris, supra, was relief against the state prosecution as such, i.e., an injunction against enforcement of the underlying criminal statute. In Stefanelli v. Minard, 342 U.S. 117 (1951)--cited by this Court in Gerstein--the plaintiff sought a federal ruling that certain evidence was illegally seized and could not be used against him, relief that certainly would have "prejudice[d] the trial on the merits" in the state court and involved the federal court in the piecemeal trial of

collateral issues. In Huffman v. Pursue, Ltd., supra, the Younger rule was extended to certain civil proceedings; as in Younger, the challenge was to the constitutionality of the relevant statute, and the relief sought was an injunction against the state court proceedings as such (i.e., against execution of the judgment). Huffman, supra, 420 U.S. at 598-99. Citing Huffman, the court below stated that it would be "anomalous" to apply Younger in a civil action in which the state has "some concern" but not to bail-setting, in which the state has "a most profound interest." Appendix at 13a. This view fails to recognize that the applicability of Younger depends not just on the interest underlying a state proceeding, but also on whether the relief contemplated would abort or pre-empt that proceeding. The order in this case clearly would do neither.

The Court of Appeals' reliance on O'Shea v. Littleton, supra, is equally erroneous and underlines the need for this Court to spell out the criteria for applying the Younger rule. O'Shea turned on the absence of a case or controversy, a matter not in issue here. The court below looked instead to the extensive dicta of that case, which condemned the possibility of an "ongoing federal audit of state criminal proceedings," 414 U.S. at 500; and it declared: "This is precisely the mischief created by the order below. . . .

[T]he order would permit a pre-trial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof. This would constitute not only an interference in state bail hearing procedures, but also the kind of continuing surveillance found to be objectionable in O'Shea." Appendix at 13a-14a. The allegation in O'Shea was that certain state judges were making decisions intended to discriminate racially and to deter the exercise of First Amendment rights. 414 U.S. at 491-92. The relief contemplated would have involved monitoring the content of state court decisions with the purpose of altering those decisions. By contrast, the District Court's judgment addressed only the absence of procedural rights as in Gerstein v. Pugh, and enforcement would be restricted to assuring that procedural requirements were complied with. Any claim that a bail hearing yielded the wrong result or considered improper factors, or that a statement of reasons was wrong or inadequate, would properly be raised in the state courts. This would not "indirectly accomplish the kind of interference that Younger v. Harris, supra, and related cases sought to prevent," O'Shea, 414 U.S. at 500, nor is it "the kind of continuing surveillance found to be objectionable in O'Shea" (Appendix at 14a). It is no more intrusive than the "further proceedings" directed by this Court in Gerstein v. Pugh,

supra, 420 U.S. at 126.

Moreover, the use of O'Shea to defeat the petitioners' reliance on Gerstein turns stare decisis on its head and indicates a need for this Court to clarify the relationship of the Gerstein holding to the earlier O'Shea dicta. The Court of Appeals could not agree "that the Gerstein Court intended to overrule O'Shea in a footnote which did not even discuss it." Appendix at 19a. However, since the O'Shea Court found no case or controversy present, those portions of the opinion relied on below are dicta, with no precedential value. O'Shea, supra, 414 U.S. at 504-05 (Blackmun, J., concurring in part), and cases cited. Moreover, the Gerstein comity holding, whether stated in a footnote or not, was essential to the decision of the case, since a contrary holding would have prevented the Court's reaching the merits. That holding, unanimously concurred in (Gerstein, supra, 420 U.S. at 126 [Stewart, J., concurring]), properly governs this case.

Finally, the Court of Appeals' disposition of the case is founded on a further misinterpretation of Gerstein v. Pugh, and it deserves this Court's attention because it suggests a radical deprivation of a trial court's normal remedial powers. The court below stated that "the federal court did not invite

state officials to submit a plan for a bail hearing which would be consistent with due process requirements," but instead "directed its own procedures for state hearings in considerable detail."* Appendix at 18a. This was viewed as contrary to the language in Gerstein stating that the nature of the probable cause hearing should be "shaped to accord with a State's pretrial procedure viewed as a whole," and that "flexibility and experimentation" are desirable. 420 U.S. at 123. Gerstein, however, did not hold that the federal courts are bound by the proposals of state authorities in remedying unconstitutional court practices. Such a holding would be self-defeating. Instead, the Gerstein Court ruled on the merits of the petitioners' claim and then remanded "for further proceedings consistent with [that] opinion." 420 U.S. at 126. Nothing in Gerstein suggests that the District Court here acted improperly in entering its order; and if it erred on the merits, the proper disposition is to correct that error and remand as in Gerstein.

The decision below is not just technically incorrect. It is inconsistent with this Court's cautious course of decision

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*This is incorrect. The District Court's order was, in fact, entered after submission of proposed orders by both parties' counsel and a subsequent conference attended by counsel for both parties and amicus curiae. The final order incorporated features of both plans and was designed expressly to fit in with existing state pretrial procedures.

in the delicate area of state-federal comity. Prior decisions have involved a nice balancing of the interests of the state and federal governments and of the litigants, with respect to the specific relief sought. For example, declaratory relief has been found permissible as to threatened, but not pending, state prosecutions. Compare Steffel v. Thompson, supra, with Samuels v. Mackell, 401 U.S. 66 (1971). Persons who complied with a challenged ordinance pending a federal decision were treated differently from those who violated it and were then prosecuted. Doran v. Salem Inn, Inc., supra. The court below failed to weigh the actual interests at stake when it equated the sweeping intervention condemned in O'Shea v. Littleton, supra, with the clear and limited order of the District Court. It failed to discuss the concrete interests of the petitioners in obtaining the order's protection or to analyze the actual interference of the order with state policies. It identified no interest of the state in avoiding fairer bail proceedings. It did not even mention the requirement of a statement of reasons outside the summary of facts, though the issues that requirement raises are quite different from those surrounding the evidentiary hearing requirement. This Court should make it clear that the requirements of comity, in this case as in Steffel and in Salem Inn, turn on real-world practicalities

and not on abstractions or formalities, and it should spell out the nature of the interests to be considered in the comity analysis.

II

THE DECISION BELOW FLOUTS THE BASIC PRECEPTS OF FEDERAL CIVIL RIGHTS JURISDICTION BY REQUIRING EXHAUSTION OF STATE JUDICIAL REMEDIES THAT ARE DEMONSTRABLY INADEQUATE TO PROTECT PETITIONERS' RIGHTS.

In rejecting the District Court's views on comity, the Court of Appeals relied heavily on the existence of state remedies and the petitoners' failure to seek relief in the state courts. By now it is familiar that under 42 U.S.C. § 1983, state remedies "need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961).* The decision below is flatly inconsistent with that principle; but more importantly, it consigns the petitioners to a system of state remedies that cannot protect their rights.

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*The rule of Younger v. Harris, supra, is in effect a limited exhaustion requirement. See Schlesinger v. Councilman, 420 U.S. 738, 756 (1975). However, as argued in Point I, it applies only to those matters which are to be resolved in the state criminal process, can be raised in defense of the criminal prosecution, and/or implicate the merits of some part of the criminal case. Gerstein v. Pugh, supra, 420 U.S. at 108, n. 9. It does not require exhaustion with respect to procedural claims that are not at issue either at trial or on a bail application, and it certainly does not require bringing a separate state proceeding, in addition to defending the criminal case, before bringing a federal action.

At trial, petitioners presented evidence and argument that the procedures employed by the state courts in Kings County do not meet constitutional standards of due process, and the District Court found in their favor (see Statement of the Case, supra, pp. 5-8). Dismissing these findings, the Court of Appeals stated (Appendix at 17a):

> ". . . It is clear that the New York statutory provisions afford unlimited opportunities for bail applications and, while plaintiffs characterize them as constitutionally suspect since the court below condemned their perfunctory application, there was in fact no finding that the statutes are constitutionally vulnerable but rather that the attorneys and judges are proceeding without assuring plaintiffs due process. We have found no New York cases construing the New York bail procedure statutes to deny plaintiffs the evidentiary hearing mandated;. . ." (footnotes omitted).

It is settled beyond doubt that the administration of law can deny rights as completely as the laws themselves, Yick Wo v. Hopkins, 118 U.S. 356 (1886), and that federal remedial authority extends to the denial of constitutional rights whether or not they are authorized by state law. Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913). Moreover, the Civil Rights Act was specifically directed at situations "where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, supra, 365 U.S. at 174. The Court of Appeals' position, that the existence of theoretical

state remedies precludes federal scrutiny of their adequacy, is ultimately circular and exalts form over substance.*

. The court below also emphasized that pre-trial detainees may petition for a writ of habeas corpus and appeal the denial thereof in the state courts. Appendix at 15a. That fact has no bearing on the question of comity, as Gerstein v. Pugh, supra, illustrates. There, two avenues of obtaining a probable cause determination in the state courts apparently existed, but they were not given any weight because a "substantial period" passed before they became available. Gerstein, supra, 420 U.S. at 106. Where an individual seeks redress for an incorrect bail decision, collateral, appellate, or other delayed remedy must be held sufficient, since some error is inevitable in any human institution. But when there is a systematically unconstitutional procedure affecting the liberty of an entire class of persons, collateral or appellate relief for individual victims of that procedure is inadequate. They are entitled, as in Gerstein, to a constitutionally sound procedure at the outset of the deprivation of liberty, not after the delay of an appeal or of a separate

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*The Court of Appeals also incorrectly stated that "evidentiary-type hearings are now granted" in a special bail review part. In fact, only oral argument is permitted, and most defendants only gain access to this part some months after they are arrested. Appendix at 32a-33a.

proceeding. They are also entitled, as in Gerstein, to class-wide prospective relief to ensure their rights.

III

THIS CASE IS IMPORTANT BECAUSE THE DECISION BELOW, WHICH DENIED FEDERAL RELIEF IN THE FACE OF UNDISPUTED FINDINGS OF MASSIVE AND REGULAR CONSTITUTIONAL VIOLATIONS, EFFECTIVELY EXCLUDES AN ENTIRE CLASS OF INDIGENT PERSONS FROM THE PROTECTION OF THE CIVIL RIGHTS STATUTES.

Petitioners proved at trial, and the District Court found, that the defendant judicial officers routinely set bail for members of petitioners' class on the basis of incomplete or misleading information at hearings which do not meet the standards of due process, and then fail to provide the most elementary due process requirement, a statement of reasons for the action taken. The Court of Appeals did not dispute or question any part of these findings; instead, it reversed without reaching the merits. It held, in effect, that federal courts cannot enjoin unconstitutional state court practices unless (a) the illegality is authorized by state statute or case law (see Point II), (b), the issue cannot be litigated in the state courts, defensively, affirmatively, directly, or collaterally (see Point II), and (c) the federal court permits the perpetrators of the wrong to decide what relief will be granted against them (Point I). This is not a rule of federalism or equitable restraint; it

approaches a sweeping rule of immunity from federal injunctive relief. This result contradicts the explicit holding of this Court that § 1983 was intended by Congress to protect constitutional rights from unlawful judicial action. Mitchum v. Foster, 407 U.S. 225, 240-42 (1972).

The decision below thus abdicates federal responsibility in an area where federal protection of individual rights is most crucial. No useful purpose is served thereby. Denying accused persons an adequate bail hearing and a statement of reasons for bail decisions serves no legitimate purpose of state or federal government or of the public. It guarantees that some persons will be mistakenly detained, at great cost to themselves, their families, and society, and others mistakenly released, at great cost to the administration of justice. It will also serve to undermine confidence in the fairness of our judicial process among all those who pass through it or witness it.

Further, the decision below denies federal court protection to those who are least able to defend themselves otherwise. It is a truism that state courts, too, are bound to follow the Constitution. But in the overburdened criminal court systems of our large cities, where rights are denied not by incorrect rules of law but by default, neglect, and adminis-

trative breakdown, the absence of a federal forum for the clear articulation of constitutional rights may render those rights nugatory. The urgency of this need is underscored by petitioners' position. Criminal defendants generally are drawn from the dispossessed and powerless of society. Within this group, the present petitioners are doubly powerless. They are mostly black and Hispanic; they are poor, they are uneducated, they are unemployed; and most crucially, they are locked in squalid cages and denied effective means to make their voices heard in any other public forum. They are truly the defenseless of the nation. If the federal courts will not defend their rights, then they will have no rights.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1128—September Term, 1974.

(Argued May 23, 1975 Decided June 30, 1975.)

Docket No. 75-2069

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs-Appellees,

—against—

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, etc., et al.,

Defendants-Appellants.

THE UNITED STATES OF AMERICA ex. rel.
MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MICHAEL A. MCLAUGHLIN, et al.,

Plaintiffs-Appellees,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

Before:

MULLIGAN and GURFEIN, *Circuit Judges*
and POLLACK*, *District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, Hon. Orrin G. Judd, *J.*, mandating the granting on demand of evidentiary hearings on the issue of bail to pre-trial detainees.

Reversed insofar as appealed from.

STEPHEN M. LATIMER, Bronx, New York (Daniel L. Alterman, Robert Boehm, William M. Kunstler, Center for Constitutional Rights, New York, N.Y.; James Reif, National Lawyers Guild, New York, N.Y.; Alvin J. Bronstein, Nancy Crisman, National Prison Project, Washington, D.C.), *for Plaintiffs-Appellees.*

STANLEY L. KANTOR, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, Margery E. Reifler, Asst. Attorney General, of Counsel), *for Defendants-Appellants.*

* Of the Southern District of New York, sitting by designation.

WILLIAM GALLAGHER, PIERCE GERETY, JR., ROBERT HERMANN, N.Y.U. Law School, for Amicus Curiae Legal Aid Society, New York, New York.

MULLIGAN, *Circuit Judge:*

This is an appeal from a final judgment entered March 26, 1975 in the United States District Court for the Eastern District of New York, Hon. Orrin G. Judd, *Judge,* mandating a variety of new bail procedures in the Supreme and Criminal Courts of Kings County, New York. The judgment was entered in accordance with a memorandum decision of Judge Judd dated February 14, 1975 (as yet unreported). We reverse.

I.

This action was commenced in July 1972 as a class action pro se by a group of inmates awaiting trial or sentencing in the Brooklyn House of Detention for Men. As twice amended, the complaint, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202, stated eight claims for relief.[1] The named defendants include the Justices of the Supreme Court of Kings County, as well as local administrative officials and court personnel. In gist, the plaintiffs alleged (a) that the burgeoning criminal caseload in the Kings County Supreme Court has caused excessive pre-trial delays and the consequent confinement of unconvicted detainees for prolonged periods of time in violation of their constitutional rights; (b) that the incarceration of indigent detainees unable to make bail violates the equal protection and due process clauses of the

1 The various claims for relief are set forth in *Wallace* v. *Kern*, 499 F.2d 1345, 1347 n.2 (2d Cir. 1974), cert. denied, 95 S. Ct. 1329 (1975).

Fourteenth Amendment; and (c) that various practices have the effect of intimidating and coercing detainees into pleading guilty rather than stand trial.

This case has been on appeal in this court twice before. *Wallace* v. *Kern*, 481 F.2d 621 (1973) (*per curiam*), cert. denied, 414 U.S. 1135 (1974) (*Wallace I*); *Wallace* v. *Kern*, 499 F.2d 1345 (1974), cert. denied, 95 S.Ct. 1329 (1975) (*Wallace II*). In *Wallace I*, Judge Judd had granted an application for a preliminary injunction against the Legal Aid Society's acceptance of any additional felony cases in the Kings County Supreme Court if the average caseload of its attorneys exceeded 40. The district court also had ordered the Clerk of the Criminal Term of the Kings County Supreme Court to place on the calendar all pro se motions filed by inmates of the Brooklyn House of Detention. This court reversed on the grounds that jurisdiction under section 1983 was absent since the Society was not acting under color of state law and that the court lacked power to intervene in the internal practices of the state courts. In *Wallace II*, Judge Judd had granted an application for a preliminary injunction ordering that each detainee held for trial for more than six months be allowed to demand a trial and be released on his own recognizance if not brought to trial within 45 days of his demand. This court reversed on the ground that questions concerning the right to a speedy trial are properly to be determined on a case-by-case basis rather than by a broad and sweeping order.

In this final stage of the case, the plaintiffs claimed that procedures in the state courts regarding bail are arbitrary and unreasonable. As a remedy, although not specified in the complaint, the plaintiffs sought improvements in the physical facilities of the courts so that attorneys might adequately consult with clients unable to post bail; an evidentiary hearing on the question of bail within 72 hours

after arraignment; and a written statement by the judge of his reasons for fixing bail at any point when a bail decision is made. The plaintiffs also sought a declaration that current practices have a coercive effect on a detainee in regard to his decision whether to plead guilty or stand trial. After hearing numerous witnesses,[2] Judge Judd made findings of fact and conclusions of law on these issues.

A. *Bail Practices in Kings County*

Despite much improvement since the commencement of this action,[3] Judge Judd found that criminal justice in Kings County is beset by lengthy delays which have an effect upon bail procedures. These begin in the Criminal Court when the defendant is arraigned after his arrest and bail is first set. There is provision for a preliminary hearing within 72 hours but this is usually adjourned. If a hearing is held, bail may be reduced or the defendant may be released on his own recognizance, but, according to the findings below, this also rarely occurs. A defendant may

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2 Among those who testified at the hearing, which lasted seven trial days between July 25, 1974 and October 18, 1974, were several prisoners, one Criminal Court Judge, three Supreme Court Justices, five Legal Aid Society lawyers, two Assistant District Attorneys, a psychiatrist, a sociologist and two law professors.

3 For example, there was testimony that the information-gathering process with regard to the records of detainees in the Kings County Supreme Court has improved. Judge Judd recognized that the Supreme Court has undertaken a variety of administrative steps, including increasing the number of criminal parts, which have lessened trial delays. In the first few months of 1974, the number of defendants awaiting trial for nine months or more and six months or more was reduced in each case by over 30%. The Supreme Court has also imposed a limitation upon the number of cases that can be handled by Legal Aid Society lawyers in order to provide defendants with more effective representation. The Society has developed a new system designed to provide continuity of representation by a single attorney for each case. Administrative measures have been taken to ensure efficient production of prisoners in court.

remain incarcerated for 45 days before he is indicted on a felony charge and his case proceeds to the Supreme Court. See N.Y. Crim. Proc. Law § 190.80. At the arraignment in Supreme Court, a de novo bail proceeding is held. The district court found, however, that those not released before this point generally remain incarcerated.

Several weeks after arraignment, a defendant's case will be called in the conference part for the purpose of disposing of the case by plea, if possible. At this time, the defendant may apply for bail review. A few weeks thereafter, the case will be assigned to a trial part. Further bail review applications may be filed in the motion part and considered in the trial part. If the defendant still is unable to meet bail, he may apply in Part 10, a special bail review section of the Supreme Court. Finally, a defendant may apply in the Supreme Court for habeas corpus, with review in the Appellate Division.[4]

Judge Judd found that certain sources of information relative to the bail decision are of great significance, namely, the New York State Criminal Investigation Information Service (NYSIIS) report and an ROR (Release on Own Recognizance) sheet. The NYSIIS report contains a listing of all of the defendant's arrests, but is usually incomplete with respect to the dispositions of those cases. The ROR sheet contains information on a defendant's background and community ties. While the Pre-Trial Service Agency, an organization funded by the federal and state governments which provides information to the court to assist it in making decisions on bail, endeavors to verify the assertions in the ROR sheet, Judge Judd found that in most cases it is unable to do so prior to the initial bail hearing. Bail proceedings in Criminal Court are very brief

4 The district court found that there is no limit to the number of times a defendant can apply for bail review.

and the determinations made therein are often based upon incomplete or inadequate information. The court found that consideration is often given to open charges in the NYSIIS report but denied as to unverified favorable information in the ROR sheet.

Despite the fact that the factors underlying the bail decision of the Criminal Court judge are not known to him,[5] the arraigning Justice in the Supreme Court, Judge Judd found, seldom changes that decision, giving "[s]ubstantial weight" to the initial determination of the Criminal Court judge. In the conference part, the defendant sees a Justice only if he agrees to plead guilty. While a majority of applicants in Part 10 are granted bail reductions, Judge Judd noted that there was testimony "that the bail set in Part 10 could have been met if it had been set earlier."[6]

On the basis of these facts, Judge Judd reached certain conclusions of law.

B. *Conclusions of Law*

Relying upon *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and its progeny, the district court held that due process requires "that a decision which may result in prolonged confinement shall be based on full evaluation of the facts,

5 The Administrative Judge of the Criminal Court has directed the judges to put the reasons supporting their bail decisions in writing on the bail papers. The district court found that, although many judges put such reasons in the record, only a few write them on the papers. Moreover, the record of bail proceedings is not transcribed.

6 The plaintiffs submitted to the court a copy of a computer study made in New York County which concluded that a person under incarceration has a lesser chance of being cleared, avoiding prison or obtaining a short sentence than one out on bail. The district judge noted some facts about the study which tended to limit its applicability to this case. Nonetheless, he found that a detained person has poorer prospects for vindication at trial or probation if convicted than does a defendant who has been released.

with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached." To correct the inadequate bail determination procedures which he found to exist in Kings County, Judge Judd ordered that an evidentiary hearing be had on demand at any time after 72 hours from the original arraignment and whenever new evidence or changes in facts may justify. At the hearing, the People would be required to present evidence of the need for monetary bail and the reasons why alternate forms of release would not assure the defendant's return for trial, and the defendant would be permitted to present evidence showing why monetary bail would be unnecessary. The defendant was also held to be entitled to a written statement of the judge's reasons for denying or fixing bail.[7]

7 The order of the district court provides in pertinent part as follows:

(3) ORDERED, ADJUDGED AND DECLARED, pursuant to 28 U.S.C. Sec. 2201, that a criminal defendant, charged with a felony in Kings County and confined at any institution under the care, custody and control of the defendant Department of Correction be entitled

(a) to a hearing at which the People shall recommend what form of security if any, would secure the defendants' appearance in Court and, only if monetary bail is recommended, the People shall present evidence of the need therefor, and the reasons why alternative conditions of security should not be available; and at which the defendant shall be present and may present evidence cognizable by the court on the factors negating the need for money bail, which hearing shall be had, on written or oral demand, and on five days notice to the People, at any time after 72 hours after arraignment or as new evidence or changes in facts may justify thereafter;

(b) the prosecution shall have the burden of proving the need for monetary bail and shall state the reasons why non-financial conditions of release, as well as other financial alternatives prescribed by state statute (CPL Sec. 520.10) will not assure the accused's reappearance at trial.

(c) this evidentiary hearing must be given within five (5) days after a demand is made or at the next scheduled court appearance of the defendant whichever is sooner.

The court below dismissed the rest of the complaint except as indicated.[8]

II

The State on appeal urges that the final order of the court below in effect mandates a wholesale reform of the New York State bail system which constitutes an untoward interference with the state judicial system and violates established principles of comity and federalism. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Younger* v. *Harris*, 401 U.S. 37 (1971). There is no doubt that this court in its two prior reversals of the court below considered that the orders issued there constituted an improper intervention in the internal procedures of state courts. The broad order of *Wallace II* provided that all

(d) the demand may be made orally in open court or in writing, pro se or by counsel.

(e) if the demand is made in writing it shall specify information sufficient to identify the defendant and shall also set forth the current conditions under which the defendant may be released and in the case of alleged new evidence or changes in circumstances, the new circumstances or evidence;

(f) pretrial incarceration of sixty days shall be a change in facts sufficient to justify a *de novo* bail hearing; and it is further

(4) ORDERED, ADJUDGED AND DECLARED that a criminal defendant is entitled to receive a written statement of the reasons for denying or fixing bail including the facts relied on and to have a *de novo* bail hearing upon five (5) days notice to the People, if he/she is held in custody without a written statement of reasons for the instant bail determination. . . .

8 The district court directed certain defendants to file with the court a plan for assuring privacy for conferences between an attorney and his incarcerated client. The court rejected plaintiffs' claim that conditions in Kings County tended to effectively coerce guilty pleas, on the ground that claims of coercion of guilty pleas are to be decided on a case-by-case basis. The court also concluded that a monetary bail system does not constitute per se a violation of the equal protection clause of the Fourteenth Amendment. These rulings are not questioned on this appeal.

detainees after six months be allowed to demand trial and be released on their own recognizance if not brought to trial within 45 days. In reversing, this court ruled that federal courts

> must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

499 F.2d at 1351.

While the court below held that the issue of the effect of delay on the coercion of guilty pleas had to be determined on a case-by-case basis, it apparently considered the evidence developed at the hearing sufficiently compelling, despite the prior admonitions of this court, to mandate pretrial evidentiary bail hearings on demand. The order below, in thus proceeding to legislate and engraft new procedures upon existing state criminal practices affecting all felony inmates in Kings County confined in any institution under the care, custody and control of the Department of Corrections, so that pending as well as future bail applications are affected, necessarily imposes upon us the duty of deciding the threshold question raised by the defendants—is the intrusion violative of the principles of comity and federalism as defined by the Supreme Court in *Younger* and its recent holdings which have broadened the doctrine of abstention.

In a recent explication of *Younger* in *Huffman* v. *Pursue, Ltd.*, 95 S. Ct. 1200 (1975), Mr. Justice Rehnquist, writing the majority opinion, reiterated that federal injunctions against the "state criminal law enforcement process" could be issued only "'under extraordinary circumstances

where the danger of irreparable loss is both great and immediate.'" Id. at 1206, quoting from *Fenner* v. *Boykin*, 271 U.S. 240, 243 (1926). The Court again announced the twofold policy basis for non-intervention in state proceedings:

1) The recognition, both congressional and judicial, that federal courts should permit state courts to try state cases and that, if constitutional issues arise, the state court judges are fully competent to handle them, since they are bound by the Federal Constitution under Article VI.

2) The traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law.

Both of these factors were reiterated by Mr. Justice Powell in an even more recent opinion, *Schlesinger* v. *Councilman*, 95 S. Ct. 1300, 1311-12 (1975). See also *Kugler* v. *Helfant*, 95 S. Ct. 1524, 1530-31 (1975).

Although the court below did in its findings of fact note that state habeas relief was available to the plaintiff class with provision for appeal to the Appellate Division, there is no reference to the availability of this remedy in that part of the opinion which rejected the argument that principles of comity and federalism precluded the issuance of the order on review here. The court below found *Younger* abstention inappropriate primarily because in that case and in *Samuels* v. *Mackell*, 401 U.S. 66 (1971) a federal court sought to prevent the prosecution of a state criminal trial, while the issue here involved the necessity of revisions in bail proceedings in order to prevent improper pre-trial confinement, which would not be an issue on a defendant's trial on a criminal charge.[9]

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9 The district judge further commented that the plaintiffs were not seeking interference with a criminal trial or any pending bail applica-

The proposition that the principles underlying *Younger* are applicable only where the federal court is seeking to enjoin a pending state criminal prosecution is not supportable.[10] Certainly this court in *Wallace I* and *II* did not agree. In *Wallace I* this court warned that "'under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts.'" 481 F.2d at 622.

More significantly, in *Huffman* v. *Pursue, Ltd., supra,* the Court broadened *Younger* abstention to preclude federal interference in certain state court *civil* actions in which the state had a particular interest.[11] This court had previously refused to intervene in pending bar association

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tion but merely a declaration of rights. Although the complaint here does not even seek an evidentiary hearing in its prayer for relief, the order appealed from is mandatory and orders the defendants to provide a new procedure set forth in the order to supplant existing practice. That can only be characterized as an interference with the state criminal process in both pending and future bail proceedings. The court's reference to *Steffel* v. *Thompson*, 415 U.S. 452 (1974) is therefore not apposite.

10 In fact, the Supreme Court has recently stated: ". . . we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force." *Hicks* v. *Miranda*, 43 U.S.L.W. 4857, 4862 (June 24, 1975). The argument that plaintiff indictees in state criminal cases were denied the right to the assignment of counsel and were therefore entitled to mandatory injunctive relief was held to be without merit by this court in *Bedrosian* v. *Mintz*, slip op. 4245 (2d Cir. June 20, 1975). This court specifically rejected the contention that *Younger* v. *Harris* was not applicable since the assignment of counsel was merely collateral to the prosecution of the indictee appellants. Id. at 4251.

11 The pending civil proceeding in *Huffman* v. *Pursue, Ltd.* was an action under a statute which provided that a place exhibiting obscene films was a nuisance. The state's interest there was in prohibiting the exhibition of pornography, and this interest was expressed in criminal statutes related to the nuisance statute under which the state was moving against the appellee. 95 S. Ct. at 1208.

disciplinary proceedings in *Erdmann* v. *Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972), and, fortified by *Huffman*, that holding was reiterated in two subsequent holdings of this court in *Anonymous* v. *Association of the Bar of the City of New York*, slip op. 2715, —— F.2d —— (1975) and *Anonymous J.* v. *Bar Association of Erie County*, slip op. 2711, —— F.2d —— (1975). It would indeed be anomalous to hold that *Younger* abstention is applicable in certain civil actions in which the state has some concern but not to a bail application proceeding in which the people of the State of New York have a most profound interest. The assurance that a defendant who has been indicted for a crime be present to stand his state trial and be sentenced if convicted is patently of prime concern to the state.

The defendants here also rely upon *O'Shea* v. *Littleton, supra*. The plaintiffs in *O'Shea* brought a class action against two state court judges alleging that they had engaged in racially discriminatory bail and sentencing practices. Although the Court held as a threshold matter that the plaintiffs lacked standing to bring the action, it proceeded at considerable length to state that *Younger*-type abstention principles were in any event applicable. The Court considered that the order proposed by the Court of Appeals, which would have required continuous reporting on the judges' bail and sentencing actions, would constitute an "ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris, supra,* and related cases sought to prevent." 414 U.S. at 500. This is precisely the mischief created by the order below. Having provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings, the order would permit a pre-trial detainee who

claimed that the order was not complied with to proceed to the federal court for interpretations thereof. This would constitute not only an interference in state bail hearing procedures, but also the kind of continuing surveillance found to be objectionable in *O'Shea*.

The plaintiffs on appeal urge that the *O'Shea* dicta are inapplicable in light of a more recent opinion of the Supreme Court, *Gerstein* v. *Pugh*, 95 S. Ct. 854 (1975), decided February 18, 1975. We cannot agree and find that case distinguishable factually and legally from the one on appeal. In *Gerstein*, two state prisoners commenced a section 1983 action seeking both declaratory and injunctive relief to enforce their constitutional right to a judicial hearing on the issue of probable cause for detention. They had been arrested in Dade County, Florida under a prosecutor's information which, according to the procedure of that state, precluded any right to a preliminary hearing to determine if continued detention was justified by probable cause. The district and circuit courts had ordered the Dade County defendants to give the plaintiffs an immediate preliminary hearing and also ordered them to submit a plan, subsequently adopted, providing for preliminary hearings in all cases instituted by information. Such hearings were to be fully evidentiary and adversary in nature, with the right of the defendant to call and cross-examine witnesses. While the Court held intervention appropriate, it disagreed with the holding on the merits below that evidentiary hearings were constitutionally mandated.

The reasoning of the *Gerstein* Court on the intervention issue does not materially assist the plaintiffs here. With respect to the issue of comity and federalism. the plaintiffs rely on footnote 9 in the *Gerstein* opinion, 95 S. Ct. at 860. which is set forth in its entirety in the margin.[12] Al-

12 "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger* v. *Harris*, 401 U.S. 37 . . . (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover* v. *Montemuro*, 477 F.2d 1073, 1082 (CA3 1973); cf. *Perez* v. *Ledesma*, 401 U.S. 82 . . . (1971); *Stefanelli* v. *Minard*, 342 U.S. 117 . . . (1951)."

though this language is certainly facially supportive of the plaintiffs' position here, it is elementary that what the Court said must be viewed in the light of the factual and legal setting the Court encountered. As we have already noted and as plaintiffs concede, the *Younger* doctrine is based not only on a reluctance to interfere with state court processes, but also on the refusal to afford equitable relief when adequate remedies at law exist. It is significant, therefore, that the Supreme Court's opinion in *Gerstein* emphasizes at the outset that the federal plaintiffs there had no right to institute state habeas corpus proceedings except perhaps in exceptional circumstances and that their only other state remedies were a preliminary hearing which could take place only after 30 days or an application at arraignment, which was often delayed a month or more after arrest. 95 S. Ct. at 859. We do not consider this discussion feckless.

In sharp contrast with the Florida practice, New York procedures, as indicated in our summary of the facts, provide that a pre-trial detainee may petition for a writ of habeas corpus in the Supreme Court (N.Y. C.P.L.R. § 7002(b)(5)), that its denial may be appealed (N.Y. C.P.L.R. § 7011) and that an original application for habeas may be made in the Appellate Division of the Supreme Court (N.Y. C.P.L.R. 7002(b)(5)). In addition, in *Conover* v. *Montemuro*, 477 F.2d 1073 (3d Cir. 1973), cited by the Supreme Court in *Gerstein*, as we point out in footnote 12 *infra*, both the majority and concurring opinions empha-

sized the unavailability of state remedies. Hence, the language in footnote 9 of *Gerstein* must be read in the full context of the *Younger* rule, which rests on principles of equity as well as comity. When so considered, it is clearly not decisive of this issue.[13]

In addition, we note that the district court conclusion in the *Gerstein* case that *Younger* did not apply was specifically coupled with the finding that Florida had consistently held that detainees such as the plaintiffs in that case were not entitled to a preliminary hearing of any kind.

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13 We recognize, of course, that exhaustion of state judicial remedies is not required in actions brought under section 1983. *Preiser* v. *Rodriguez*, 411 U.S. 475, 477 (1973); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). This rule does not, however, alter the traditional equitable principle that a plaintiff seeking equitable relief must demonstrate that no adequate remedy at law exists and that, absent injunctive relief, he will suffer irreparable injury. This point is made clear in *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974). In *Potwora* v. *Dillon*, 386 F.2d 74, 77 (2d Cir. 1967), Judge Friendly said that the Supreme Court, in announcing the non-exhaustion rule for 1983 cases,

> surely had no intention to abrogate in civil rights cases the historic rule . . . that suits in equity shall not be sustained in courts of the United States "in any case where a plain, adequate and complete remedy may be had at law."

Accord, *Appalachian Volunteers, Inc.* v. *Clark*, 432 F.2d 530, 537 (6th Cir. 1970), cert. denied, 401 U.S. 939 (1971); *Engelman* v. *Cahn*, 425 F.2d 954, 958 (2d Cir. 1969), cert. denied, 397 U.S. 1009 (1970); *Wright* v. *McMann*, 387 F.2d 519, 523 (2d Cir. 1967); *Silverman* v. *Browning*, 359 F. Supp. 173, 176-77 (D. Conn. 1972), aff'd on the opinion below, 411 U.S. 941 (1973). See also *Bradley* v. *Judges of Superior Court*, 372 F. Supp. 26 (C.D. Calif. 1974); *Harrington* v. *Arceneaux*, 367 F. Supp. 1268 (W.D. La. 1973).

In *Conover* v. *Montemuro*, 477 F.2d 1073, 1081 (3d Cir. 1973), a 1983 case relied upon in the opinion below and by the plaintiffs here, Judge Gibbons for the majority noted that the court knew of no Pennsylvania procedure which might permit a test of the legality of the adjudication of delinquents. It seems fair to assume that, had there been some such procedure, or if, on the remand ordered there, one were discovered, equitable relief would have been held to be barred, as suggested by Judge Adams in his concurring opinion, 477 F.2d at 1092, wherein state habeas was mentioned as a possible legal remedy affording adequate relief.

332 F. Supp. 1107, 1111-12 (S.D. Fla. 1971). This is important since to come within the *Younger* rubric, as re-emphasized in *Huffman* v. *Pursue, Ltd.* and *Schlesinger* v. *Councilman, supra,* a plaintiff must establish "irreparable harm." However, in the record before us there is no indication that any plaintiff ever even asked for an evidentiary hearing. On the contrary, the record indicates that two state judges not only testified that no evidentiary hearing on a bail application had ever been requested by anyone, but that if one had been demanded it would have been granted.[14] In fact, in Special Term Part 10 in Kings County evidentiary-type hearings are now granted. It is clear that the New York statutory provisions afford unlimited opportunities for bail applications[15] and, while plaintiffs characterize them as constitutionally suspect since the court below condemned their perfunctory application, there was in fact no finding that the statutes are constitutionally vulnerable but rather that the attorneys and judges are proceeding without assuring plaintiffs due process. We have found no New York cases construing the New York bail procedure statutes to deny plaintiffs the evidentiary hearing mandated[16]; on the contrary, in *United States ex rel. Shakur* v. *Commissioner of Corrections,* 303 F. Supp. 303, 308 (S.D.N.Y.), aff'd, 418 F.2d 243 (2d Cir. 1969) (*per curiam*), cert. denied, 397 U.S. 999 (1970), Judge Palmieri

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14 Judge Judd's order does not *require* that an evidentiary hearing always be held; under the order a hearing need be held only when the detainee *requests* it. We repeat that none of the plaintiff class has even made the request.

15 See footnote 4 *supra.*

16 Several New York cases suggest that a hearing might be required by a New York court upon application therefor. See *People ex rel. Singer* v. *Corbett*, 26 App. Div. 2d 770, 271 N.Y.S.2d 921, 923 (4th Dep't 1966); *People* v. *Terrell*, 309 N.Y.S.2d 776, 786 (Monroe Cty. Ct. 1970); *People* v. *Bach*, 61 Misc. 2d 630, 306 N.Y.S.2d 365, 368 (Dutchess Cty. Ct. 1970).

considered the necessity of an evidentiary hearing on application for bail in the New York County Supreme Court and said that it was a matter for the state court's discretionary decision. In affirming Judge Palmieri's opinion this court characterized it as "a careful opinion. . . ." 418 F.2d at 244.

Plaintiffs argue that the intrusion upon the domain of the state sought in *O'Shea* was much more significant than that sought here, which they argue is comparable to that approved in *Gerstein*. Since the federal courts have not been loathe to interfere where charges of racial bigotry are bruited, the refusal to intercede in *O'Shea* on grounds of comity and federalism is indeed significant. But we cannot agree that the order below is less pervasive than in *Gerstein*. Here, the federal court did not invite state officials to submit a plan for a bail hearing which would be consistent with due process requirements. It rather directed its own procedures for state hearings in considerable detail. This constitutes, in our view, federal judicial legislation which is not only offensive to state sensibilities but is contrary to the admonition in *Gerstein* on this very point:

> There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States.

95 S. Ct. at 868.

In view of these decisive distinctions between *Gerstein* and the present case, we consider that it does not provide assistance to the plaintiffs here but, on the contrary, strengthens the stand of the defendants. We cannot, moreover, agree that the *Gerstein* Court intended to overrule *O'Shea* in a footnote which does not even discuss it. Indeed, the Court's later opinion in *Huffman* evinces an even greater respect for comity by extending it to state civil litigation in which there is a state interest. In sum, we hold that, under *Younger* and its further explication in recent Supreme Court cases, the order entered below, insofar as appealed from, must be reversed. The order created an intrusion upon existing state criminal process which is fissiparous and gratuitous and it further ignored the prior rulings of this court on appeals in this case.

We would be remiss if we did not indicate, as this court has before on appeals in this case, that we are conscious of the concern of the court below for the conditions which the hearings it has conducted have brought to the attention of the public. The court below noted that there are judges, prosecutors and Legal Aid attorneys who are striving valiantly to achieve prompt trials. A motivating factor in the recognition of urgency and in the improvements which have already occurred is undoubtedly the activity of Judge Judd. However, we are not ombudsmen charged with the responsibility of reforming the state penal system.[17] The hearings held below establish that pre-trial delay is due to a variety of factors, not the least of which are the staggering increase in crime in Kings County, lack of facilities, lack of judges on the bench and counsel at the side of those accused of crime, plus the increasing demands on the time of those charged

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17 At the outset of the opinion below, the court said:

> Governor Hugh L. Carey, in his inaugural address on January 1, 1975, said that
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> "[T]he criminal justice system in New York does not work."
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> This memorandum deals with another effort to enlist the help of federal courts in making the state criminal justice system work better.

with the responsibility of assuring prompt and even-handed justice. Because of our position of abstention we do not discuss the merits here but do note the observation of the Supreme Court in a comparable situation in *Gerstein:*

> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. *A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.*

95 S. Ct. at 867 n. 23 (emphasis added).

Reversed insofar as appealed from.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DONALD WALLACE, et al. . . . on behalf of themselves and all others similarly situated, who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs,

- against - 72 C 898

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, . . . individually and as Justices of the Supreme Court of the State of New York, Kings County; and VINCENT D. DAMIANI, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; BENJAMIN MALCOLM, individually and as Commissioner of Correction of the City of New York; . . . JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County,

Defendants.

- -x

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. McLAUGHLIN, et al. . . .

Plaintiffs, 73 C 53

- against -

THE PEOPLE OF THE STATE OF NEW YORK;

(Caption continued)

THE PEOPLE OF THE CITY OF NEW YORK;
THE CHIEF PRESIDING JUSTICE of the
Supreme Court of the State of New York;
and all ASSOCIATE JUDGES of the State
of New York; NATHAN SELKIN, Chief Clerk,
Appellate Division, Second Judicial
Department; JOSEPH PARISI, Chief Clerk,
Supreme Court, State of New York; THE
LEGAL AID SOCIETY of the City of New
York; GEORGE SPANAKOS, Administrator,
State of New York, County of Kings,

Defendants.

- x

MICHAEL A. McLAUGHLIN, et al. . . .

Plaintiffs,

73 C 113

- against -

THE PEOPLE OF THE STATE OF NEW YORK;
THE PEOPLE OF THE CITY OF NEW YORK;
THE CHIEF PRESIDING JUSTICE of the
Supreme Court of the State of New York;
and all ASSOCIATE JUDGES of the State
of New York; THE LEGAL AID SOCIETY,
CRIMINAL DEFENSE DIVISION of the City
and State of New York; THE NEW YORK
STATE ADMINISTRATOR, County of Kings,

Februayr 14, 1975

Defendants.

- -x

Appearances:

DANIEL L. ALTERMAN, Esq.
ROBERT BOEHM, Esq.
WILLIAM M. KUNSTLER, Esq.
C/o Center for Constitutional Rights

STEPHEN M. LATIMER, Esq.

Appearances (continued)

JAMES REIF, Esq.
National Lawyers Guild

ALVIN J. BRONSTEIN, Esq.
NANCY CRISMAN, Esq.
National Prison Project
Attorneys for Plaintiffs

MICHAEL A. McLAUGHLIN, Plaintiff
Pro Se

HILLEL HOFFMAN, Esq.
Assistant Attorney General

Attorney for State Defendants

A. MICHAEL WEBER, Esq.
Assistant Corporation Counsel
Attorney for defendant Department of Correction

J U D D, J.

MEMORANDUM AND DECISION

Governor Hugh L. Carey, in his inaugural address on January 1, 1975, said that

> "[T]he criminal justice system in New York does not work."

This memorandum deals with another effort to enlist the help of federal courts in making the state criminal justice system work better.

In this civil rights class action, on behalf of felony defendants housed in Brooklyn House of Detention for Men (BHD), the court has completed the trial of the remaining issues, relating to bail practices in the Criminal Parts of the Kings County Supreme Court and to alleged coercion of guilty pleas resulting from those practices.

In connection with bail practices, plaintiffs assert that state procedures are "uniformly arbitrary and unreasonable" and that this court ought to direct that there be

(1) a de novo evidentiary hearing within 72 hours after arraignment in the Criminal Court or in the Supreme Court on indictment,

(2) a written statement of reasons for fixing bail at each stage where a bail determination is made, and

(3) improvements in facilities so that attorneys may have meaningful consultations with clients who are held in default of bail.

In connection with guilty pleas, plaintiffs ask for a declaratory judgment that the cumulative impact of existing practices exerts a coercive effect on the choice

whether to plead guilty or demand a trial.

In earlier decisions, the court has dealt with two other principal claims, first that plaintiffs' rights to counsel was impaired by the excessive caseload of Legal Aid Society attorneys, and second that plaintiffs' overlong confinement denied their constitutional right to speedy trials. Both matters were decided for the defendants by the Court of Appeals, after initial grants of relief by this court, 481 F.2d 621 (2d Cir. 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879 (1974); 499 F.2d 1345 (2d Cir. 1974).

With respect to the caseload of Legal Aid attorneys, the Kings County Supreme Court has, without the compulsion of an injunction, reduced it to approximately the level recommended by this court. With respect to trial delays, there appears to have been a degree of improvement, but still short of what this court considers to be constitutional requirements.

At the hearings on the bail and coerced plea issues, the court heard six prisoners, one Criminal Court judge, three Supreme Court justices, the director of the Pre-Trial Services Agency, five Legal Aid Society attorneys, a

psychiatrist, a sociologist, two law professors, two Assistant District Attorneys, a representative of the Department of Correction, and a former president of the Legal Aid Society. In addition, the court has considered numerous depositions, and sheaves of exhibits, statistics and compilations. The last memorandum of law following the hearings was filed on December 17, 1974.

Facts

Bail procedures must be considered in the context of trial delays, which continue in spite of strenuous efforts to remedy them. Even after many improvements in the period of more than two years since this case began, trial times are still far from the goals set in 1972 by the New York Legislature, which require that the People be ready for trial within 90 days after the confinement of a prisoner in a jail case and within six months after arrest in a bail case. Criminal Procedure Law § 30.30. Accurate statistics proved to be elusive, but Justice Damiani, the Assistant Administrative Judge in charge of the Criminal Branch of the Supreme Court in the Second Judicial District, testified in September 1974 that the July 31, 1974 figures showed 347 defendants in jail more than six months and 223 more than

nine months. On December 31, 1972 there had been 644 defendants who had been at BHD more than six months, and nearly half that number over a year. See Memorandum dated May 10, 1973, in this case.

Of the last ten Supreme Court trials in which the Legal Aid Society had been involved, as testified on October 18, 1974, the defendants had been in jail for periods ranging from 184 to 521 days. The accompanying exhibit showed that the ten trials resulted in one conviction on the charges, three convictions for lesser felonies or misdemeanors, one dismissal and five acquittals. In July 1973, when a similar report was made by the Legal Aid Society of the most recent trials, the defendants had been in jail for an average period of from 10 to 14 months (300 to 420 days), and two out of seven were acquitted.

Keith Ryan, one of the named plaintiffs in this case, with no prior felony arrest, spent fourteen months in jail, and ultimately was acquitted.

The Existing Bail Practices

The bail system in the Kings County Supreme Court is a multi-stage process. It begins in the Criminal Court when the defendant is arraigned after his arrest and bail is set for the first time. There is a theoretical second appearance in the Criminal Court within 72 hours for the preliminary hearing, but this is usually adjourned. At the preliminary hearing, if one is held, bail may be reduced or the defendant may be released on his own recognizance (ROR), but testimony indicates that this seldom occurs unless there is a guilty plea or a substantial reduction in the charges. There may be a delay of 45 days before indictment of a defendant charged with a felony, with the defendant held in jail. (Defendants charged with felonies must be released on their own recognizance unless indicted within this period. Criminal Procedure Law § 190.80) Within a week or two after indictment, a defendant will be arraigned in Supreme Court. Although it was stated that at the Supreme Court arraignment there is in essence a de novo bail hearing, it was conceded that generally "those who are in stay in, and those who are out, stay out."

Within a few weeks after his Supreme Court arraignment, the defendant's case will be called in the conference part, to determine whether a plea bargain can be arranged; at that time he may again apply for bail review. Within a few more weeks the case will be assigned to a trial part, and bail review applications may be filed in the motion part and considered in the trial part. A further application in Part 10 is permissible if the defendant still cannot meet his bail requirements. Applications in the Supreme Court for habeas corpus are also available, and may be reviewed in the Appellate Division.

During the Criminal Court stage, inadequate information and inadequate access to counsel adversely affect the defendant's possibility of release pending trial. The average bail proceeding takes only about two to five minutes. The prior criminal record is a major factor in determining both whether bail will be required and the amount of bail. The existence of a prior criminal record is initially determined by a report of The New York State Criminal Investigation Information Service (NYSIIS), which in turn is based on the F.B.I. fingerprint record. The NYSIIS report contains a record of all arrests, but it is incomplete with respect

to dispositions in from 75% to 90% of the cases. Determining what happened after the arrests is a time-consuming job, especially for arrests outside of Kings County, and is rarely done.

The personal history and roots in the community are another important factor in determining whether bail will be required and the amount of bail. These facts are based on an ROR sheet (Release on Own Recognizance). The Pre-Trial Service Agency is now available to check the various items on the ROR sheets, but in most instances it is not possible to verify facts favorable to a defendant before the initial bail hearing. Open charges on the NYSIIS report are often given weight, and unverified favorable facts on the ROR sheet are often denied weight. The testimony in this case justifies a finding that more defendants would be released on their own recognizance or on low bail if more information could be verified at an early stage.

Most defendants who are held in jail for non-homicide charges have a prior criminal record. This was true of the named plaintiffs in this case. No statistics were provided to show the relative number of first offenders and

of people with records who fail to return to court if released after arrest. Professor Harry Subin of New York University Law School testified concerning the opinion of unnamed bail bondsmen that there was a greater risk with an amateur than with a professional criminal. Supreme Court Justice Irwin Brownstein testified that a subconscious fear of new crimes being committed while a defendant was at large formed a factor in bail determinations.

Bail review at the Supreme Court arraignment seldom results in the release of a defendant who has been in jail since his arrest. Substantial weight is given to the initial determination of the Criminal Court Judge, although the basis of his determination is not before the court. Even if the Criminal Court Judge explained on the record the reasons for fixing a particular bail, the minutes of the hearing are never available in the Supreme Court. Arraignments in the Supreme Court, like those in Criminal Court, usually take from two to five minutes. Most attorneys lack time to investigate case dispositions or verify information on the ROR form. Supreme Court Justice Damiani said that he accepts the defendant's statements concerning the disposition of open charges and has found them to be accurate 95% of the time, but many

arraignment judges treat defendants' statements as suspect.

In the conference part the defendant does not see a judge unless he agrees to plead guilty. He is kept in a holding pen, where his attorney may consult with him to report any plea offers.

Some measure of bail relief is available in Part 10, where Mr. Justice Hyman Barshay has been sitting for three years, since the part was created. The records show that he has granted bail reductions in a majority of the cases that came before him. No information was provided as to the number of defendants who were able to obtain their release after Part 10 bail reductions, but there was testimony for plaintiffs that the bail set in Part 10 could have been met if it had been set earlier. The average person whose bail motion comes on in Part 10 has been in jail at least two or three months, often as long as a year or more, and sometimes as long as two years. Justice Barshay makes the decision on bail reduction after hearing oral argument from a defendant's attorney, which includes information on length of incarceration, age, background, occupation, roots in the community, court appearances, and the gravity of the

charges. Cases where he releases a defendant on his own recognizance are generally those where he has been in a long time and the gravity of the charges is not great.

Mr. Justice Damiani testified concerning the urging by Chief Judge Charles D. Breitel to improve the situation. He gave his opinion that in many instances a defendant in jail can get a trial within six months. The court believes that this may be true of a man whose attorney makes constant and vigorous motions for bail reduction and speedy trial; but the many burdens on lawyers, and the low level of fees provided under Article 18-B of the County Law mean that in practice the ordinary defendant in jail cannot get a trial until his regular turn. In individual cases, where this court has directed release unless there is a speedy trial, the Supreme Court has afforded a trial.

On over-all bail release, the director of the Pre-Trial Services Agency testified that about 43% of all defendants were released at their initial arraignment, and about 10% or 15% at some later stage. It appears that considerable weight will be given to an employer or clergyman's support of a request for release or for low bail.

Little use is made of any alternative forms of bail other than cash or a surety bond. Even the forms

prepared for use by judges are geared to make release without bail harder, for the rubber stamps which are provided have spaces only for the amounts of insurance company bonds or cash bail. Any other form of release must be written out by the judge.

With respect to evidentiary hearings, Judge William H. Booth, who has served for five and a half years on the Criminal Court, testified that he had received no request for an evidentiary hearing, but that he would grant one if requested. He also said that subsequent information would frequently justify parole or a reduced bail. The decision, however, is often influenced more by the original bail determination than by new facts. A Legal Aid witness said that the evidence to be presented at the proposed hearing after 72 hours would consist mainly of a verified ROR sheet, a Pre-Trial Services report, and a completed NYSIIS form, if the other agencies could cooperate in checking the information.

With respect to statements of reasons for fixing bail, it appears that Judge Ross, who had been the Administrative Judge of the Criminal Court, sent a memorandum to the judges directing them to put reasons in writing on the papers

for bail determinations. While many judges put such reasons in the record, only a few write them on the papers. Since the record is not transcribed, the reasons are not available for consideration by the Supreme Court Justice.

Concerning the risk of non-appearance by a defendant, the director of the Pre-Trial Services Agency (PTSA) reported that the skip rate on persons released on their own recognizance was about 8%, of which only about 4% were wilful. Some non-appearances are a result of misunderstanding or illness or simply inability to find the part of the court in which the defendant was supposed to reappear. Of those detainees whom PTSA recommended for release on their own recognizance, the skip rate shows as low as 2%, with higher rates on those whose qualifications for release could not be verified. However, the director testified that in an "expanded release" program in February, 1974 when 66% of all defendants were released on their own recognizance, the skip rate was only 8.7%, which did not show a valid statistical difference from the general rate.

The Pre-Trial Services Agency has experimented with a supervised release program, which involves cooperation

with community agencies to assume some responsibility for defendants who are released pending trial. For a ten-month period it reported that only 3.2 percent of a total of 377 scheduled appearances resulted in the issuance of a bench warrant. The possible expansion of this program was not explored.

No correlation was shown between the percentage of defendants who failed to appear and the seriousness of the crimes charged, or the number of prior convictions. In fact, the attorney in charge of the Criminal Defense Division of the Legal Aid Society asserted that the skip rate was lower on more serious charges. The evidence on this particular point was inadequate to support a finding by the court.

A collateral point which was not covered by any evidence is the source of bail. It is common knowledge that in a substantial number of cases bail is not posted by the defendant but by a relative, friend or organization. No percentage statistics are available.

There is no limit to the number of times that any defendant can apply for bail review.

The Study in the Bellamy Case

Plaintiffs submitted to the court a copy of a study made in New York County in connection with the Legal Aid Society's attack on the bail system before the First Department Appellate Division in John Bellamy, et al. v. The Judges and Justices Authorized to Sit in the New York City Criminal Court and the New York State Supreme Court in New York County. The citation of the case and a discussion of the opinion appears later in this memorandum. The study in Bellamy was made by Eric W. Single, a doctoral candidate in sociology at Columbia University, who was associated with the University Bureau of Applied Social Research and a teacher of Methods of Social Research at City College. An analysis of 287 closed cases showed that a man out of jail has twice as good a chance of being cleared, of avoiding prison, or of having a short sentence, as the man in jail, regardless of the type of crime, the existence of a confession, the finding of evidence on his person, the existence of aggravating circumstances, the prior criminal record, the strength of family ties, or the employment status at the time of arrest. The 857 cases included 790 which arose and were finally disposed of in the Criminal Court, and 67 which arose in either the

Criminal Court or the Supreme Court but were ultimately disposed of in the Supreme Court.

An opposing affidavit by Judge Irving Lang, Supervising Judge of the Criminal Court for New York County, asserted that there were actually dispositions shown for only 736 of the 857 sample cases and that the remaining 121 were subject to bench warrants issued for non-appearance between conviction and sentencing. The raw material for the Bellamy study, in the Appellate Division file, includes 100 pages of computer printouts prepared by Calculogic Corporation and approximately 170 pages of opposing affidavits relating to bail practices generally and to individual cases included in the Legal Aid Society study.

Dr. Single presented live testimony to this court. He described a further study of 1200 cases that he had made in 1973, again showing that the outcome for people on bail is better than for those who remain in jail. This study, however, was only of Criminal Court cases. He was not familiar with ROR sheets, or with the Pre-Trial Services Agency, or Manhattan bail review procedures, and could not say whether Manhattan and Brooklyn were fully comparable.

Access to Counsel

Facilities for consultation between counsel and an incarcerated defendant are admittedly inadequate. Efforts to improve the facilities have been made, but state court officials did not claim that they are presently anywhere near an optimum standard.

In the Criminal Court, Legal Aid Society attorneys consult their clients in a bullpen area about 15 feet long and 10 feet wide, containing two benches, but no tables or desks, and usually occupied by a number of defendants, up to 40, together with correction officers and police officers. Interviews are conducted while the attorney and client are standing up. Defendants are frequently reluctant to talk frankly about their cases. The lack of privacy and of quiet impose a severe obstacle to the creation of any satisfactory lawyer-client relationship. Private attorneys and 18-B attorneys must speak to their clients on a bench within the courtroom, and are not permitted access to the bullpen.

In the Supreme Court the situation is not much better, except that the third floor facilities have been greatly improved during the course of this action. There are

no courtroom holding cells and it sometimes takes from 10 to 15 minutes to get a prisoner from the fourth floor holding cells to the ninth floor for an appearance in court. On the ninth floor, there is no suitable place for a conference between the defendant and his attorney.

Justice Damiani said in September that he hoped to put up panels to give more privacy to attorney-client interviews. No timetable was set up, however.

The provisions for visitation at detention centers are also unsatisfactory. Delays in getting an inmate from the cell block to the counsel room at BHD permit an attorney to see only one or two defendants in a morning or afternoon session. A visit to Rikers Island is a long trip and requires half a day to see one inmate. Consequently, many lawyers wait until a client is produced in court before consulting with him.

The compensation of 18-B attorneys is still limited to $10 an hour for time out of court (less than the charge for labor on automobile repairs) and $15 per hour for time in court. Mr. Justice Brownstein testified that fee applications even at these rates are frequently reduced by the Appellate

Division.

Effects of Incarceration

Various forms of prejudice were shown to result from prolonged incarceration. Because it is difficult for a white lawyer or investigator to speak with persons in the black or Hispanic communities, incarceration hampers contact with potential defense witnesses. Witnesses who might have been available are often lost; the prosecution also suffers from delay and the resultant attrition of witnesses, but to a lesser degree. Defendants are likely to lose jobs which they could retain if released, or which an employer might keep open for a brief time. Their family relationships are impaired. Inmates suffer from personality changes, a feeling of helplessness, a loss of faith in the judicial process, and emotional upsets.

Whether an inmate is convicted or acquitted, his period in jail is a period that is useless, or nearly so. If he is acquitted, there is no way to compensate him for the time that he has lost or the personal hardships that he has suffered. If he is convicted, he has lost the opportunity for rehabilitation, which is one of the basic purposes of sentencing. BHD and QHD lack the facilities for vocational

training, education, recreation and adjustment to honest labor, which penal institutions seek (however unsuccessfully) to provide. There are a substantial number of such programs at both BHD and QHD, but they are restricted in capacity by the physical layout of the buildings and by limitations of staff and budget.

A defendant's opportunity for early parole, if convicted, is impaired because he has not been able to build up a record with the prison authorities during the time for which he has been in pre-trial detention. The psychiatrist at BHD states that a state prisoner who knows his sentence is in a much better psychological situation than a pre-trial detainee who is under the anxiety of not knowing when he will be tried or what the result of the trial may be. Even in matters like recreational activity, medical care and dental care, the pre-trial detention facilities are inferior to the services provided up-state for sentenced prisoners.

The court finds that trial results are likely to be less favorable for a prisoner in jail than for one who is at large, though the extent of the difference cannot be defined. The man who is in jail is also less likely to be given probation,

Alleged Coercion to Plead Guilty

With respect to coerced pleas, no specific examples were shown of any defendant who was in fact innocent and who pleaded guilty because of the length of his confinement. However, Samuel H. Dawson, then the Assistant Attorney in Charge of the Legal Aid Society's Brooklyn office, testified that many defendants asserted their innocence, but took guilty pleas in order to get out of jail. Although there was some evidence that the best plea offers are made at the beginning of a case, he testified that on many occasions a defendant may be offered a misdemeanor plea or a one-year sentence followed by probation and that such an offer is hard to resist when the jail time has already been served before trial. Professor Bernard Segal of Golden Gate University testified that there is coercion to accept less than the defendant's full constitutional rights, and to give up believable defenses in exchange for the termination of lengthy pre-trial confinement. Mr. Justice Damiani also said that the length of stay in jail may tend to coerce a guilty plea.

In the end, 90% to 95% of all defendants plead guilty. About 25% of the pleas are received at the time of

the conference. Most of the rest come when the District Attorney moves the case for trial, or at the time of trial, or just after a suppression hearing. In the state courts the denial of a motion to suppress may be reviewed on appeal from a guilty plea.

Several improvements in procedure have been accomplished during the two and a half years thatthis case has been in process. A "vertical" system has been introduced by the Legal Aid Society to endeavor to provide continuity of representation by the same attorney throughout a case. The number of criminal parts has been increased from 20 to 37. The judges have been directed to try the oldest jail cases first.

Non-production of prisoners in court has been reduced. "Record cards" are now supposed to accompany a defendent to and from court. Instructions have been given that a date for the next court appearance by the defendant must be entered on the card before he is returned to the place of detention, so that there will be a definite record to assure his production on the next date. The percentage of prisoners produced in court has increased from 80% to 95%, although

not all are there at 10:00 in the morning.

Orders have been given that every defendant who is brought to the courthouse should be brought before a judge, but the actual figures show a failure to obtain full compliance with this problem. In March, 1974, 29% of the prisoners delivered to court were not seen by a judge. In June 1974 the percentage not seen by a judge had been reduced to 23%, and in August to 16%, according to Department of Correction statistics, which may suffer from some inaccuracy.

Actual court control of calendars was put into effect in the late summer of 1974, but it is too early to determine the extent to which this may remedy problems of delay that arose when the calendars were prepared by the District Attorneys.

There are judges, prosecutors and Legal Aid attorneys who are striving valiantly to achieve prompt trials, fair bail determinations, and all the accompaniments of due process, but the present system creates serious obstacles.

Discussion

The bail question involves different considerations from the claim concerning coerced pleas.

Bail

Amendment VIII to the United States Constitution guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The constitutional guarantee against excessive bail does not mean that bail is a matter of right in all cases. Carlson v. Landon, 342 U.S. 524, 545-46, 72 S.Ct. 525, 537 (1952) (alleged illegal alien held pending deportation). See also United States ex rel. Covington v. Coparo, 297 F.Supp. 203, 206 (S.D.N.Y. 1969), where Judge Weinfeld stated:

> ". . . a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably; but, under the Eighth Amendment, where bail is fixed in either instance, it must not be

> "excessive, and further, where bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail."

Although freedom from excessive bail is not clearly binding on the states, Schilb v. Kuebel, 404 U.S. 357, 365, 92 S.Ct. 479, 484 (1971), the Court of Appeals in this circuit "entertain[s] little doubt" that in an appropriate case the Supreme Court will make the bail provisions of the Eighth Amendment applicable to the states. United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972). The New York State Court of Appeals finds sufficient authority in lower court federal cases to reach the same conclusion. People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 499, fn 1, 307 N.Y.S.2d 207, 209 fn 1 (1969).

In any event, the prohibition against excessive bail is enunciated in similar terms by the federal and state constitutions. See New York State Constitution, Art. 1 § 5. The purpose of bail, and the recognition of individual factors in the determination of bail, are also similar. See Practice Commentary to § 510.30 of New York Criminal Procedure Law in McKinney's Consolidated Laws.

In Stack v. Boyle, 342 U.S. 1, 4-5, 72 S.Ct. 1, 3-4 (1951), the court struck down a $50,000 bail uniformly set for twelve conspirators charged with violation of the Smith Act. The bail was deemed excessive under the Eighth Amendment because it was not set in compliance with statutory or constitutional standards. The court said:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285, 15 S. Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Ex parte Milburn, 1835, 9 Pet. 704, 710, 9 L.Ed. 280 . . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

Justice Jackson's specially concurring opinion further stated (342 U.S. at 8, 72 S.Ct. at 5):

> "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. . . ."

In Bellamy v. Judges and Justices, 41 A.D.2d 196, 342 N.Y.S.2d 137, 139, aff'd without opinion, 32 N.Y.2d 886, 346 N.Y.S.2d 812 (1973), the court ruled that a class action seeking a declaratory judgment as to the constitutionality of the bail system was not a proper class action "because there are individual determinations to be made in every bail application . . . ". Quoting from People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 111 (1947), the court listed individual factors a judge must consider (342 N.Y.S.2d at 139):

> "The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat. The factual matters to be taken into account include: "the nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction. . . ". (citations deleted)

Additionally, Article 500 of the Criminal Procedure Law, enacted in 1970 in an attempt "to bring clarity and consistency to the area of 'release on recognizance and bail'" (See Practice Commentary, 11 A McKinney's, at p. 8), embodies, in Section 510.30, the same limitations imposed by Stack.

Section 510.30, subd.2, C.P.L., states:

> "(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:
> (i) the principal's character, reputation, habits and mental condition;
> (ii) his employment and financial resources; and
> (iii) his family ties and the length of his residence if any in the community; and
> (iv) his criminal record if any; and
> (v) his previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
> (vi) if he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
> (vii) if he is a defendant, the sentence which may be or has been imposed upon conviction."

These factors are substantially similar to those which a federal court is directed to consider under the Bail Reform Act of 1966. 18 U.S.C. § 3146(b).

The further purpose of preventive detention (refusal of bail for fear that the accused will be a danger to society if allowed to remain at large while awaiting trial) had been considered by the Temporary Commission on Revision of the Penal Law and Criminal Code and was rejected.

The forms of bail authorized by the New York Criminal Procedure Law are limited to the following:

> "§ 520.10
> 1. (a) Cash bail.
> (b) An insurance company bail bond.
> (c) A secured surety bond.
> (d) A secured appearance bond.
> (e) A partially secured surety bond.
> (f) A partially secured appearance bond.
> (g) An unsecured surety bond.
> (h) An unsecured appearance bond."

The "unsecured surety bond" may be a bond executed by a surety other than an insurance company, and payable if the defendant fails to appear. CPL § 500.10(19). This affords a bail-setting judge an alternative midway between requiring cash bail or a surety company bond and releasing the defendant on his own recognizance. In effect, the unsecured surety

bond provides the financial obligation of a third party, which may have to be enforced in a civil action, but which does indicate that someone else is ready to accept a substantial risk in order to guarantee the defendant's appearance.

The American Bar Association's Standards Relating to Pretrial Release (Approved Draft 1968) specify subjects of inquiry similar to those in the Criminal Procedure Law and the Bail Reform Act. They emphasize especially the presumption that a defendant is entitled to be released on his own recognizance unless there is a finding that there is substantial risk of non-appearance (Section 5.1), and expressly provide that in any event (Section 5.2(a)),

> " . . . the judicial officer should impose the least onerous condition reasonably likely to assure the defendant's appearance in court."

The Standards also provide for automatic re-examination of the release decision if the defendant has failed to secure his release within a reasonable time (Section 5.9(a)), and for frequent reports to the court concerning each defendant who has failed to secure his release.

In the Bellamy case, the Legal Aid Society mounted a full scale attack on the bail system. The case was brought in the Appellate Division as an original application for prohibition or mandamus directed to the Judges of the Criminal Court and the Justices of the Supreme Court. The Appellate Division considered the attack on the constitutionality of the bail system to be insubstantial, on the basis of the Schilb case, supra. It pointed out that the problem of bail jumping, which resulted in 31,855 bench warrants being issued by the Criminal Court in New York County alone in a period of less than two years, showed a substantial risk of non-appearance. 342 N.Y.S.2d at 143. In respect of the showing that a man on bail was less likely to be convicted than one in jail, the court said (342 N.Y.S.2d at 144):

> "It is not because bail is required that the defendant is later convicted. It is because he is likely to be convicted that bail may be required.
>
> ***
>
> The factors for allowing bail, when properly applied, generally lead to a conclusion that those denied bail are more likely to be convicted, and if the statistics prove this out, as they do, it shows the system is working rather than, as plaintiffs contend, that it is, instead, detrimental to a defense against an accusation."

The Bellamy case was presented to the Appellate Division on affidavits, without live testimony, and was decided without specific findings on the factual issues presented. The statistics offered by the Legal Aid Society in the Bellamy case seem to this court to have more validity than the Appellate Division accorded them, but they cannot be applied in this case. For one thing, this court would have to analyze not only the single study, but the opposing affidavits, which were not placed into evidence here and were not the subject of argument. (The Appellate Division record was borrowed temporarily from that Court for consideration during the preparation of this memorandum). Even assuming that the Bellamy statistics were accepted at face value, and that criminal defendants in Kings County are similar to those in New York County, there are other differences which were not explored. The Bellamy study included only 67 Supreme Court cases, which may not be an adequate sample. The actual practices used in fixing bail in New York County may be different from those prevailing in Kings County. This court cannot take judicial notice that judges are fungible. There were indications at the hearings in this court that trial delays are more serious i Kings County than in New York

County, but no evidence was directed to the extent of differences or to the effect of such differences on incarcerated defendants.

The New York Court of Appeals agrees with the federal rule that bail be determined with reference to the facts in the individual case. Thus the court stated in People ex rel. Klein v. Krueger, supra, 25 N.Y.2d at 501, 307 N.Y.S. 2d 211, that

> "Even where an exercise of discretion is operative there must, as a matter of law, be underlying facts which will support that exercise either in denying bail or fixing the amount of bail."

Bail has been found to be excessive, in violation of the Eighth Amendment, where the amount is more than is necessary to guarantee the presence of the accused at his trial. Sellers v. United States, 89 S.Ct. 36, 38 (1968) (bail pending appeal); United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946); People ex rel. Lobell v. McDonnell, 296 N.Y. 109 (1947).

Plaintiffs' attack on the Kings County bail system must be further analyzed, however, with respect to equal protection factors and due process factors.

Equal Protection

The question of denial of equal protection to the indigent by the requirement of bail was raised by Mr. Justice Douglas in Bandy v. United States, 81 S.Ct. 197, 198 (1960). He said, in considering an application for release on personal recognizance:

> "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying his release. . . "

Chief Judge Bazelon cited the Bandy case in a separate opinion dealing with an appeal from the denial of a motion to reduce bail, and emphasized the court's responsibility to explore non-financial alternatives. (Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965)), saying:

> "[I]f the court determined that high monetary bond would adequately deter flight, but that appellant could not provide this bond, then the court would be constitutionally compelled to inquire

> "whether other assurances of appellant's presence would be adequate. It is an invidious discrimination to deny appellant release because of his poverty when, for example, his ties in the community or such devices as release subject to the supervision of the United States Probation office, would adequately insure his presence." (Emphasis added).

The challenge of Bandy has not been considered by the Supreme Court, although that Court has moved steadily forward since Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956) in requiring that justice be applied to all persons equally and not on the basis of ability to pay. Treating wealth as a suspect classification, a statute which provided imprisonment only for those who could not pay their fines was stricken down in Tate v. Short, 401 U.S. 395, 399, 91 S.Ct. 668, 671 (1971). The existence of alternative methods of protecting the state's interest was used in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849 (1972), as a ground for striking down a high filing fee in connection with Texas primary elections.

In Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018, 2023 (1970), the court concluded that an indigent could not be required to "work off" his fine at $5.00 a day

because this would be an "invidious discrimination solely because he is unable to pay the fine."

A district court, in United States ex rel. Shakur v. Commissioner of Correction, 303 F.Supp. 303, 309 (S.D.N.Y. 1969), noted that the money bail system in recent years has come under close scrutiny and that the Federal Bail Reform Act of 1966 "reflected an acute awareness of the problems inherent in the system." See United States v. Leathers, 412 F.2d 169 (D.C.Cir. 1969). But the system per se was found to be "consistent with the respective interests of the person accused of a crime and the legitimate concerns of the law-abiding community." (303 F.Supp. at 309 - Palmieri, J.)

The crucial factor is that the initial determination of bail should not be an arbitrary one and that reviews of bail should be determined on the facts pertinent to the individual case.

With respect to the necessity for individual consideration of the right to bail, a pertinent case is Ackies v. Purdy, 322 F.Supp. 38, 42 (S.D. Fla. 1970), where a master bond schedule set a fixed monetary sum as bail for particular charges. The court struck it down as violative of both the

due process and equal protection clauses of the Fourteenth Amendment, saying

> "Since the function of bail is limited to assuring the presence of a defendant at trial, Stack v. Boyle, supra, it is obvious that money amounts set solely by the charge have no relation to the function of bail. A poor man with strong ties in the community may be more likely to appear than a man with some cash and no community involvement. So, not only is there no compelling interest in incarcerating the poor man because he cannot make the master bond bail, but the classification fails to meet the traditional test for equal protection:
>
> > Equal protection does not require that all persons be dealt with identically, but does require that a distinction made have some relevance to the purpose for which the classification is made. Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 763, 15 L.Ed.2d 620 (1966)."

To decide whether a law violates the equal protection clause, Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999 (1972), teaches us to examine

> ". . . the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

The compelling state interest test was used in the Dunn case to deal with a durational residence requirement on the right to vote.

There is a compelling state interest in having defendants available when their cases are reached for trial. The admittedly large number of defendants who default and for whom bench warrants must be issued furnish proof that some guarantee of the defendants' return for trial is necessary.

Fixing money bail as a guarantee for appearance at trial is not necessarily discriminatory. The standards set forth in the New York Criminal Procedure Law are intended to fix a sum as bail which will assure the defendant's appearance at trial. A higher sum may be required of an affluent man than of an indigent one. Freeing all who are poor might in fact discriminate against the well-off, for a rich man would lose money by not appearing, while an indigent person would lose nothing, except the risk of the same criminal penalty for escape which applies to rich end poor alike.

Money bail is therefore not as blatantly discriminatory, as Professor Foote asserts in his article in the University of Pennsylvania Law Review. See, generally, The Coming Constitutional Crisis in Bail, I and II, 118 U. Pa. L. Rev. 959, 1125 (1965).

Another significant factor not emphasized by either party is that bail is often put up by relatives, friends, or organizations, and not by the defendant in person. In one of the earliest prison release cases, not officially reported, Pythias asked the Tyrant of Syracuse for an opportunity to say farewell at home before sentence was executed against him. He could furnish no tangible security for his return, but he had a friend, and Damon pledged his own liberty and his life to guarantee Pythias' return. A man cannot go to jail today for his friend, but he can put up money.

In other words, a man who cannot make reasonable bail is not held simply because he is poor, but because he has not established sufficient roots in the community, or a sufficient reputation for reliability, so that someone else will guarantee his return.

Plaintiffs complain that the alternatives to cash bail or surety bond in CPL § 520.10 are not often used. Six of the eight alternatives provided in Section 520.10 boil down to either cash or a surety bond or security of some sort. The last two are an unsecured surety bond and an unsecured appearance bond, which is another name for release on his own

recognizance. Release on his own recognizance may be justified where the defendant has roots in the community, or where some form of supervision can effectively assure his appearance. Supervised release deserves further implementation, but it is not a constitutional requirement on this record.

Although the court concludes that monetary bail is not in itself a violation of equal protection, the determination that bail in a particular amount is appropriate must still meet the requirements of due process.

Due Process

Due process is a phrase of many shadings, with different requirements for different circumstances. At its lowest, it should require a hearing, an opportunity to present evidence, and a statement of reasons for the decision that is reached. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972); Goss v. Lopez, ____ U.S. ____ (Jan. 22, 1975).

The Morrissey case dealt with the right to hearings in parole revocation proceedings. The Court held (408 U.S. at 480,489, 92 S.Ct. at 2600,2604) that such proceedings did not call for "the full panoply of rights due a defendant [in a criminal]

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proceeding," but that there should be

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body [whose members, however, need not be judicial officers or lawyers]; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. . . "

Some measure of due process has long been considered necessary whenever a person is "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647 (1951).

The bail procedure in Bronx County was criticized by a state court judge as abrogating "a basic liberty," because it did not provide for adequate information to determine the apparent strength of the prosecution's case. People v. Vasquez, 348 N.Y.S.2d 1007 (Crim. Ct., Bronx Co. 1973).

if convicted, than the man who is on the street. This result is inevitable, for a man at large has had an opportunity to build an employment record and show his conformity with the law during the one to three years which will have preceded his trial.

All generalizations are subject to exceptions. Plaintiff Michael McLaughlin is an illustration of the possibility of rehabilitation even during pre-trial detention. Although the District Attorney described him to the court as a dangerous man, he was released on a plea with a sentence to time served, after this court directed that his indictment be brought to trial, and he has worked successfully for more than a year as a paraprofessional with the Center for Constitutional Rights.

If a prison sentence is imposed, the evidence in this case indicates that it is generally shorter for a man at large than for one who is already in jail, although the extent of variation cannot be determined, as the plaintiffs in the Bellamy case sought to do.

In connection with the denial of parole, which proceeded for years with only nominal hearings, it has recently been held that findings of fact are necessary. United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925, 934 (2d Cir. 1974). The Court there said:

> "[D]etailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision (e.g., that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board's inferences are based (e.g., the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing and his drug addiction).
>
> * * *
>
> A reasons requirement 'promotes thought by the decider,' and compels him 'to cover the relevant points' and 'eschew irrelevancies.' See Frankel, Criminal Sentences 40-41 (1973)."
> Id. at 931.

The same rule has recently been announced for state parole release hearings, Solari v. Vincent, N.Y.L.J. February 3, 1975, p. 1 (App.Div. 2d Dept. Jan. 20, 1975), where Mr. Justice Martuscello stated:

> "We require merely that the board state, however briefly, the ultimate grounds relied on with sufficient particularity to enable a reviewing court to determine whether inadmissible factors have influenced the decision and whether discretion has been abused."

The reasons for denying parole are different from those at issue in a bail determination, but the necessity for findings is the same.

As the court pointed out in a bail case, United States ex rel. Keating v. Bensinger, 322 F.Supp. 784, 787 (N.D. Ill. 1971), if no reasons are given for denial of bail,

> ". . . it is impossible to ascertain whether or not such denial was arbitrary or discriminatory.
>
> * * *
>
> [T]he failure to indicate the motivating reasons for the denial of bail is in and of itself an arbitrary action that violates the Eighth and Fourteenth Amendments."

There the court said it would direct release on habeas corpus unless the state court promptly elucidated the reasons for its action.

The requirement for a written statement was also applied by the Supreme Court in Wolff v. McDonnell, ____ U.S. ____, 94 S.Ct. 2963, 2978-79 (1974), with reference

to decisions depriving an inmate of good time credit.

The constitutional right to review a state bail determination by federal habeas corpus further emphasizes the need for a statement of reasons; otherwise it is difficult for the habeas court to determine whether the amount of bail is arbitrary or discriminatory and whether the defendant has been denied a fair trial or the right to counsel. Bobick v. Schaeffer, 366 F.Supp. 503 (S.D. N.Y. 1973).

In the federal system, there is provision by statute and rule for written reasons for imposing bail that cannot be met, if a request is made. In connection with pretrial detention, 18 U.S.C. § 3146(d), states:

> "A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."

In practice few defendants ask to have reasons set forth in writing, probably because the Individual Assignment System minimizes the necessity for making the reasons available to another judge and because pretrial detention is relatively short.

Where a defendant requests reasons for refusal to reduce bail, he is entitled to an individualized statement. In United States v. Briggs, 476 F.2d 947 (5th Cir. 1973), where the district court had stated that several factors justified a fixed bond for each of eight defendants, the case was remanded with the statement that (p. 949):

> "Without expressing any view as to the merits of the defendants' claims, we think at a minimum each defendant is entitled to know the reasons why the particular conditions of release were imposed in his case."(Emphasis from the opinion).

There is a separate provision relating to determination of bail pending appeal in the event of conviction. Rule 9(b) of the Federal Rules of Appellate Procedure states,

> "(b) Release pending appeal from a judgment of conviction.
>
> Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal,

> "or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending,a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof."

Standards for the statement of reasons have been laid down by the Court of Appeals of this circuit in United States v. Manarite, 430 F.2d 656, 657 (2d Cir. 1970), where the Court found that the record supported the district court's denial of bail after a conviction for extortion, but stated:

> "The district judge should state clearly and categorically his reasons for denying bail so that in reviewing his decision this court, and the Circuit Justice, may be fully advised regarding the basis for his action.
>
> . . . Of course an opinion stated on the record of the bail hearing is sufficient compliance with the requirement of a written opinion, but we do not consider extensive colloquy without any definite statement in conclusion to be in accordance with the Rule."

The importance of a written statement of reasons under F.R.A.P. 9(b) was discussed by the District of Columbia Court of Appeals in United States v. Stanley, 469 F.2d 576,

585-88 (D.C. Cir. 1972), which concluded with the words,

> "We admonish counsel and trial judges alike to tap every available source of information potentially helpful to a solid decision on releasibility."

The importance of evidence and findings appears also from the New York Court of Appeals decision on a pre-Bellamy attack on the bail system. The Court of Appeals there pointed out that the amount of bail may not be fixed solely by the nature of the offense, but it held that the court had discretion to determine whether a defendant's roots in the community were strong enough to assure his appearance for trial if released on his own recognizance. People ex rel. Gonzalez v. Warden, 21 N.Y.2d 18, 286 N.Y.S.2d 240 (1967), cert. denied, 390 U.S. 973, 88 S.Ct. 1093 (1968).

A few more comments about plaintiffs' specific prayers for relief are in order.

1. Evidentiary Bail Hearings

The nature of the hearing at a bail application may vary with circumstances. What has been said above does not answer all the questions.

The defendant is generally provided with the complaint or indictment and the NYSIIS report, which may show factors adverse to release, and he has the ROR form available to show favorable factors. Evidence concerning the strength of the case, another significant factor on the incentive not to return, usually depends on a statement by the Assistant District Attorney. For bail purposes, it would be difficult to require that the strength of the case be established by testimony of a knowledgeable person subject to cross-examination, although this is required at a preliminary hearing on a felony complaint. CPL § 180.60(8).

The principal points to be considered at an evidentiary hearing would be the facts concerning plaintiff's criminal record, his employment, his family ties, and his character and reputation, thus overcoming the negative effects of an incomplete NYSIIS report and an unverified ROR form. The extent to which other bail factors might require an evidentiary hearing should be determined in individual cases and not under general rules promulgated in advance by a federal court. Wallace v. Kern, supra, 499 F.2d at 1435.

After indictment, the court may consider grand jury minutes with respect to the strength or weakness of the case against the defendant. People ex rel. Machuca v. Glick, 38 A.D. 2d 916, 329 N.Y.S.2d 834 (1st Dept. 1972); People v. Terrell, infra, 309 N.Y.S.2d at 784-85.

It is interesting to note that bail reductions were granted in a majority of cases in Part 10, notwithstanding repeated testimony that family relationships and roots in the community deteriorate after periods of incarceration. In fact, Justice Barshay testified that he allowed people familiar with a defendant's background to speak up for him, but that it was "not very often" that anyone did. These facts strongly suggest that the initial bail determinations might have been different if evidentiary hearings had been held early in the bail setting process.

Relief in the form of conditions to be met by a state court in bail hearings was granted in Ackies v. Purdy, supra, 322 F.Supp. at 43-43, where the court specified the considerations to be used in fixing conditions of release.

In Monroe County, an evidentiary bail hearing was granted in a murder case, and resulted in release on $10,000 bail, secured by a neighbor's property. People v. Terrell, 309 N.Y.S.2d 776 (Monroe Co. Ct. 1970).

Evidentiary hearings may also promote more frequent use of alternatives to cash bail or surety bonds. In one case, a bail determination was remanded to consider "those minimal nonfinancial conditions of release which will 'assure the appearance of the person as required.'" instead of "unreachable money bonds." United States v. Leathers, supra, 412 F.2d at 173.

Plaintiffs' proposal for an evidentiary hearing within 72 hours after arrest is based on analogy from CPA § 180.80, which directs release of a felony defendant on his own recognizance after 72 hours in custody without a preliminary hearing, unless he has consented to the delay, or unless good cause is shown why release should not be granted. The 72-hour period does not thereby become a measure of constitutional right. A workable rule is set forth in the Conclusion of this Memorandum.

The fact that few defendants have specifically requested evidentiary hearings in the past does not obviate the need for relief in this respect. Rather, it reflects the speed with which bail determinations have been made and the inadequacies of the "system." On the other hand, automatic evidentiary hearings would impose burdens on the courts in many cases where such a hearing would not be fruitful.

The Supreme Court has held that there must be a jury trial on any offense which involves the possibility of imprisonment for more than six months. Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 1453 (1968), as interpreted in Argersinger v. Hamlin, 407 U.S. 25, 29, 92 S.Ct. 2006, 2008 (1972). It would be anomalous to permit a defendant to be held in jail for more than a year, without a trial, without any evidentiary hearing, and without a statement of the reasons why his bail is fixed at a figure that he cannot meet.

The court has considered the recommendations of the Temporary (Dominick) Commission on the New York State Court System in its report, " . . . And Justice for All"

(Jan. 1973), Part II, pp. 65-69, that cash bail should be abolished in favor of a system of absolute release, conditional supervised release, or absolute detention. The report made recommendations which may have merit as a basis for legislation, but this court does not regard these recommendations as establishing a constitutional standard.

2. Statement of Reasons for Bail Determination

Given the different stages at which bail is considered by a series of judges, it is important that there be a statement of reasons available to the defendant and his attorney. The nature of such statement should be worked out in individual cases, but the considerations affecting bail are specifically listed in CPL § 510.30 and could form the basis for an informative written statement, without undue burden on the court.

If written reasons are required, the courts may give more substance to the expectation set forth by the Bellamy court (342 N.Y.S.2d at 143) that after the 1972 amendment of the Criminal Procedure Law § 520.10:

> "[T]wo types of bail became the more usual form '(g) an unsecured surety bond and (h) an unsecured appearance bond', meaning that an accused would not have to deposit any money and merely incurs a legal obligation."

Since state appellate review of bail determinations is available only in habeas corpus proceedings, and review in such a proceeding is limited to the question whether constitutional or statutory standards have been violated, People ex rel. Klein v. Krueger, supra, 25 N.Y.2d at 499, 307 N.Y.S.2d at 209-10, it is important not to conclude this case without setting forth the federal constitutional standards that must be met.

3. Facilities for Consultation with Counsel

The undesirability of prolonged detention is aggravated by the lack of proper facilities for consultation between a defendant and his attorney. Some efforts are being made in Kings County Supreme Court to improve the facilities for consultation with counsel, but they are not enough.

Federal court supervision of this subject is not barred by O'Shea v. Littleton, 414 U.S. 388, 94 S.Ct. 669 (1974).

Plaintiffs and their class in this case are all detained for want of bail, and therefore have the personal stake which was found lacking in O'Shea (94 S.Ct. at 675). The relief contemplated herein concerning the standards for bail hearings will not require the monitoring of state court proceedings which was feared in O'Shea (94 S.Ct. at 679). It will set standards which may be applied in individual bail review proceedings.

The relief contemplated herein with respect to access to counsel while in the courthouse detention facilities is sanctioned by the Supreme Court's statement in Procunier v. Martinez, _____ U.S. _____, 94 S.Ct. 1800, 1807 (1974) that:

> "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether rising in a federal or state institution."

The right to confidential interviews with counsel was discussed in Rhem v. McGrath, 326 F.Supp. 681, 691 (S.D.N.Y. 1971), where Judge Mansfield said concerning the Tombs:

> "We think it only fair . . . that the inmate be afforded a full opportunity to confer or correspond with his attorney in privacy, and without observation, interference, or listening in. . . ."

The correction authorities were directed to submit a plan for modification of detention facilities to permit confidential attorney-client interviews in Souza v. Travisono, 368 F.Supp. 959, 971-72 (D.R.I. 1973 - Pettine, Ch. J.), aff'd in part, 498 F.2d 1120 (1st Cir. 1974). The right to privacy in communication with counsel was there described as "vital to due process to guarantee the effective assistance of counsel."

Protection of the Sixth Amendment right to counsel is particularly important where defendant is frequently not brought into the courtroom in the conference part, when bail and plea-bargaining are discussed.

4. Coerced Pleas

The principles affecting plaintiffs' attack on guilty pleas are similar to those discussed in relation to bail. The matter is not capable of a general rule.

A federal court should not cast doubt on thousands of state court guilty pleas by a broad new definition of coercion.

The general rule is that a guilty plea waives objections to the prior proceedings, and cannot be set aside if the defendant had adequate legal advice, unless some legal safeguard has been omitted. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970); Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1474 (1970). Adequate consultation with counsel is a necessary condition for a valid guilty plea. Windom v. Cook, 423 F.2d 721 (5th Cir. 1970); Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir.), cert. denied, 385 U.S. 939, 87 S.Ct. 306 (1966). Risks of coercion may be minimized by better facilities for consultation with attorneys. But the effect of inadequacies in consultation facilities should be determined on a case-by-case basis.

A plea of guilty results from a complex of factors. Among these are defendant's present knowledge of his guilt or innocence, and the knowledge of what evidence against him may be expected in court. In cases where there is sentence

bargaining in addition to plea bargaining, as in the state courts, the relation between the proposed sentence and the risk at trial is important.

Prolonged confinement in unsatisfactory detention facilities certainly creates a pressure to plead guilty, if only to start a definite term in better quarters. This does not make it appropriate, however, to assert by declaratory judgment that a particular period of detention per se makes a guilty plea invalid.

A great majority of state court convictions are based on guilty pleas, and no evidence has been offered to show that any substantial number of those who pleaded guilty were in fact innocent. Primarily, the question of coerced guilty pleas involves an area for determination by individual cases and not by class action.

5. Prompt Trials

Prompt trials would alleviate many of the objections to the bail system. Plaintiffs' request for relief on that score was denied on the second appeal in this case (supra, p.5), but it is clear that the prejudice resulting from any

pretrial confinement is aggravated when that confinement is prolonged.

Even though a federal court cannot fix a uniform time limit for state court trials, a state court should consider the length of time a defendant has been in custody in determining the reasonableness of bail at each stage of his case.

As Judge Weinfeld stated in United States ex rel. Covington v. Coparo, supra, 297 F.Supp. at 207:

> "In those instances where the court, in the exercise of discretion denies bail, the defendant's right to a speedy trial, a guarantee that prevents 'undue and oppressive incarceration prior to trial,' /17 assumes greater significance.
>
> /17 United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966)."

The same principle applies where bail is fixed at an unreachable figure, that the length of pre-trial detention increases the importance of due process protections in fixing bail.

The Asserted Violations of Comity

Finally, the court should mention defendants' assertion that federal jurisdiction is forbidden by the principles of comity expressed in Younger v. Harris, 401 U.S. 37, 91 S.Ct.746 (1971), and Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764 (1971). Those cases are quite different from the present one, since the plaintiffs there sought to prevent state court prosecutions. All that is brought in question in this suit is the necessity of pre-trial confinement, and the due process requirements before the state can take away the liberty of a man whose guilt has not yet been established. Improper pre-trial confinement would not be an issue on a defendant's trial on the criminal charge.

The conditions of pre-trial confinement are a proper subject of federal concern. Rhem v. Malcolm, _____ F.2d _____ (2d Cir. Nov. 8, 1974). In Younger, in contrast, plaintiffs sought an injunction against state prosecution, and in Samuels a declaratory judgment to invalidate a pending indictment. Although Samuels found that a declaratory judgment is no more permissible under those circumstances than an injunction, the Supreme Court has more recently

pointed out that different considerations apply to declaratory judgments than to injunctive relief. Steffel v. Thompson, _____ U.S. _____, 94 S.Ct. 1209, 1219-22 (1974). This case is more like Conover v. Montemuro, 477F.2d 1073 (3d Cir. 1973), where the court distinguished the Younger and Samuels cases, in dealing with the intake procedures in the Philadelphia Family Court. See also this court's earlier discussion of the question in Wallace v. McDonald, 369 F.Supp. 180, 185-88 (1973).

Plaintiffs here are not seeking even interference with any pending bail application, but an announcement of the constitutional rights to which they and other members of their class are entitled.

The decision on the first appeal in this case, concerning the treatment of pro se motions, 481 F.2d at 622, is not controlling here. This court's proposed requirements of evidentiary hearings and written statements of reasons are necessary to enforce constitutional rights announced by the Supreme Court and the Court of Appeals (supra, pp. 44, 45). The question whether a pro se motion should be considered was less important, since almost every detainee has

a lawyer, who could presumably present the same motion.

Summary of Legal Conclusions

Although pre-trial confinement under the conditions existing in the Kings County Supreme Court creates substantial prejudice both to the effective defense of the detainee and to his ultimate fate if convicted, the requirement of monetary bail as a condition of release does not per se violate the equal protection clause of the Fourteenth Amendment. Provided the court has considered the individual factors concerning the risk of a defendant's failure to appear for trial and the inadequacy of other alternatives, the state's compelling interest in having the defendant present for trial justifies the use of monetary bail in a proper case. A defendant's inability to post the required bail may reflect not simply poverty, but lack of sufficient roots in the community to induce someone else to guarantee his presence. The due process clause, however, requires that a decision which may result in prolonged confinement shall be based on full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached.

Preparation for a bail hearing, for plea bargaining, and for trial require adequate opportunity for consultation between the defendant and his attorney, which should be in conditions of privacy.

The necessity of improvements in the bail system is enhanced by the considerable length of time which frequently elapses in pre-trial confinement in Kings County.

The factors which lead a person to plead guilty are too diverse to justify any general determination as to what circumstances result in a coerced plea.

Conclusion

Judgment should be entered:

1. Denying plaintiff's prayer for an injunction against the use of money bail as a condition for release from custody.

2. Declaring that a criminal defendant charged with a felony and confined in the Brooklyn House of Detention is entitled:

(a) to a hearing at which the People shall present evidence of the need for monetary bail and the reasons why alternative conditions of release will not assure

his return for trial and at which he may present evidence on factors negating the need for monetary bail, such evidentiary hearing to be had on demand at any time after 72 hours from the original arraignment, and at such other times as new evidence or changes in facts may justify;

(b) to receive a written statement of the reasons for denying or fixing bail, and to have a de novo bail hearing on request if he is held in custody without a written statement of reasons for the bail determination;

3. Directing the defendants, Administrative Judge, Commissioner of Correction, Chief Clerk of the Supreme Court, and Clerk of the Criminal Term of the Supreme Court, within forty-five days after the filing of such judgment, to submit to plaintiffs' counsel and file with the court a plan for assuring privacy for conferences between an incarcerated defendant and his attorney at the time of his arraignment on any complaint or indictment, and at any appearance in the conference part of the Supreme Court, and at bail review proceedings, and a timetable for implementing the plan; and that the court retains jurisdiction to review the plan and its implementation; and

4. Determining that the question whether guilty pleas are coerced by reason of a defendant's long pre-trial confinement should be considered on a case by case basis, and not in a class action; and

5. Dismissing the complaint, without costs, except as outlined above.

Settle judgment on notice of three working days.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD WALLACE, et al., Plaintiffs, -against- MICHAEL KERN, et al., Defendants.	:	72 C 898

FINAL JUDGMENT ORDER
AND DECREE

The action having come on for trial before the Court, the Honorable Orrin G. Judd presiding, on Plaintiffs' motion for permanent declaratory and injunctive relief, and the court having rendered its memorandum and decision on February 14, 1975,

(1) IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' motion for an injunction enjoining the use of monetary bail as a condition of release from pretrial incarceration, be and hereby is denied; and it is further

(2) It is DECLARED pursuant to 28 U.S.C. 2201, that the Eighth and Fourteenth Amendment rights of criminal defendants charged with felonies in Kings County not to have excessive bail imposed, and to due process of law are violated in

that the bail determining practices of the Kings County Criminal and Supreme Court deprive them of liberty without due process of law; and it is further,

(3) ORDERED, ADJUDGED AND DECLARED, pursuant to 28 U.S.C. § 2201, that a criminal defendant, charged with a felony in Kings County and confined at any institution under the care, custody and control of the defendant Department of Correction be entitled

(a) to a hearing at which the People shall recommend what form of security if any, would secure the defendants' appearance in Court and, only if monetary bail is recommended, the People shall present evidence of the need therefor, and the reasons why alternative conditions of security should not be available; and at which the defendant shall be present and may present evidence cognizable by the court on the factors negating the need for money bail, which hearing shall be had, on written or oral demand, and on five days notice to the People, at any time after 72 hours after arraignment or as new evidence or changes in facts may justify thereafter;

(b) the prosecution shall have the burden of proving the need for monetary bail and shall state the reasons why non-financial conditions of release,

as well as other financial alternatives prescribed by state statute (CPL Sec. 520.10) will not assure the accused's reappearance at trial.

(c) this evidentiary hearing must be given within five (5) days after a demand is made or at the next scheduled court appearance of the defendant whichever is sooner.

(d) the demand may be made orally in open court or in writing, pro se or by counsel.

(e) if the demand is made in writing it shall specify information sufficient to identify the defendant and shall also set forth the current conditions under which the defendant may be released and in the case of alleged new evidence or changes in circumstances, the new circumstances or evidence;

(f) pretrial incarceration of sixty days shall be a change in facts sufficient to justify a de novo bail hearing; and it is further

(4) ORDERED, ADJUDGED AND DECLARED that a criminal defendant is entitled to receive a written statement of the reasons for denying or fixing bail including the facts relied on and to have a de novo bail hearing upon five (5) days notice to the People, if he/she is held in custody without a written statement of reasons for the instant bail determination; and it is further

(5) ORDERED, ADJUDGED AND DECREED that defendants, Administrative Judge, Commissioner of Corrections, Chief Clerk of the Supreme Court and Clerk of the Criminal Term of the Supreme Court within 45 days after filing of this judgment, submit to plaintiffs' counsel and file with the court, a plan including a timetable for implementation thereof, for assuring privacy for conferences between an incarcerated defendant in a criminal proceeding and his/her attorney at (a) the time of his/her arraignment on any complaint or indictment brought in the name of the People of the State of New York; (b) at any appearance at the conference part of the Supreme Court; and (c) at bail review proceedings, and at every appearance of the defendant in the Kings County Criminal or Supreme Courts; and it is further

(6) ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction to review the plan referred to in paragraph (4), hereof and its implementation and to make such further order or reason as necessary; and it is further

(7) ORDERED that counsel for the Plaintiffs are required to notify members of their class who are housed at all institutions under the care, custody and control of the Department of Correction and who have been accused of the commission of felonies in Kings County. Plaintiffs'

counsel shall deliver to the defendant Department of Correction an adequate number of notices describing this judgment and the Court's memorandum of decision, dated February 14, 1975; and it is further

(8) ORDERED that Defendant Department of Correction shall place and affix in conspicuous places in the day rooms of each floor of those institutions at least two copies of this attached notice to Plaintiffs' class; and it is further

(9) ORDERED that counsel for the Plaintiffs shall be able to inspect housing floors one time in the Brooklyn House of Detention and other institutions to assure that the class has been given adequate notice of this judgment by giving reasonable notice to the Warden and arranging a time convenient to the parties; and it is further

(10) ORDERED that the issue of whether guilty pleas are coerced by reason of a defendant's prolonged pretrial incarceration should be determined on a case by case basis; and it is further

(11) ORDERED, ADJUDGED AND DECREED, that except as hereinbefore provided, the second amended complaint herein be and hereby is dismissed, without costs.

ENTER

Dated: Brooklyn, New York
March 25, 1975

/s/ Orrin G. Judd
U.S.D.J.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth **day of** September , **one thousand nine hundred and** seventy-five.

Present:

HON. WILLIAM HUGHES MULLIGAN,
HON. MURRAY I. GURFEIN,
Circuit Judges,
HON. MILTON POLLACK,
~~Circuit Judges.~~
District Judge.

Docket No. 75-2069

DONALD WALLACE, et al.,
Plaintiffs-Appellees,
v.
MICHAEL KERN, et al.,
Defendants-Appellants.

UNITED STATES ex rel. MICHAEL A. McLAUGHLIN,
Plaintiff-Appellee,
v.
THE PEOPLE OF THE STATE OF N.Y., et al.,
Defendants-Appellants.

MICHAEL A. McLAUGHLIN, et al.,
Plaintiffs-Appellees,
v.
THE PEOPLE OF THE STATE OF N.Y., et al.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro

A. DANIEL FUSARO
Clerk